TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY OF [illegible], INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 28, 1957

CERTIORARI GRANTED DECEMBER 16, 1957

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TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16180

NATIONAL LABOR RELATIONS BOARD,
Appellant,

versus

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL.,
Appellees.

Appeal from the United States District Court for the
Southern District of Florida

APPELLANT'S DESIGNATION
AS TO PRINTING RECORD - FILED JUNE 30, 1956.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16180

National Labor Relations Board,
Appellant

versus

Duval Jewelry Company of Miami, Inc., Duval Jewelry Company, Jenkins and Sons, Inc., Jenkins Jewelry Company, and Oliver A. Jenkins,
Appellees

On Appeal from An Order of the United States District Court For The Southern District of Florida, Miami Division, Quashing Subpenas Issued by the National Labor Relations Board

The National Labor Relations Board, appellant herein, pursuant to Rule 23 of the Rules of this Court, hereby designates for printing the following portions of the record on appeal certified to this Court by the Clerk of the District Court:

1. Petition To Enforce Subpoena, filed by the National Labor Relations Board in *N. L. R. B.* v. *Duval Jewelry Com-*

pany of Miami, Inc., Civil No. 6759-M, United States District Court for the Southern District of Florida, Miami Division, together with Exhibits 1 through 12, attached thereto.

2. Order to Show Cause, issued in Civil No. 6759-M.

3. Answer of Respondent in Civil No. 6759-M.

4. Petition to Enforce Subpoena in *N. L. R. B.* v. *Duval Jewelry Company*, Civil No. 6760-M, together with Exhibits 8 and 9, attached thereto, and a statement that Exhibits 1, 2, 3, 4, 5, 6, 7, 10, 11 and 12, attached thereto, are identical in content with corresponding exhibits attached to the petition in Civil No. 6759-M.

5. Order to Show Cause, issued in Civil No. 6760-M.

6. Answer of Respondent in Civil No. 6760-M.

7. Petition to Enforce Subpoena in *N. L. R. B.* v. *Jenkins and Sons, Inc.*, Civil No. 6761-M, together with Exhibits 8 and 9, attached thereto, and a statement that Exhibits 1, 2, 3, 4, 5, 6, 7, 10, 11 and 12, attached thereto, are identical in content with corresponding exhibits attached to the Petition in Civil No. 6759-M.

8. Order to Show Cause in Civil No. 6761-M.

9. Respondent's answer in Civil No. 6761-M.

10. Petition to Enforce Subpoena in *N. L. R. B.* v. *Jenkins Jewelry Company*, Civil No. 6762-M, together with Exhibits 6a, 8 and 9 attached thereto, and a statement that Exhibits

1, 2, 3, 4, 5, 6, 7, 10, 11 and 12, attached thereto, are identical in content with corresponding exhibits attached to the petition in Civil No. 6759-M.

11. Order to Show Cause in Civil No. 6762-M.

12. Respondent's answer in Civil No. 6762-M.

13. Petition to Enforce Subpoenas in *N. L. R. B.* v. *Oliver A. Jenkins*, Civil No. 6763-M, together with Exhibits 6b, 8, 8a, and 9 attached thereto, and a statement that Exhibits 1, 2, 3, 4, 5, 6, 7, 10, 11 and 12 attached thereto, are identical in content with the corresponding exhibits attached to the petition in Civil No. 6759-M.

14. Order to Show Cause in Civil No. 6763-M.

15. Answer of Respondent in Civil No. 6763-M.

16. Order Quashing Subpoenas, entered March 30, 1956.

17. Notice of Appeal.

(s) MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel

NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C.
this 24th day of May, 1956.
(SEAL)

CERTIFICATE OF SERVICE

In The United States Court of Appeals
For The Fifth Circuit

National Labor Relations Board,
Appellant,

v.

Duval Jewelry Company of Miami, Inc., Duval Jewelry Company, Jenkins and Sons, Inc., Jenkins Jewelry Company, and Oliver A. Jenkins,
Appellees.

The undersigned certifies that one copy of Appellant's designation of portions of the record to be printed in the above cause has this day been served by first-class mail upon the following counsel at the address listed below:

Messrs. Hamilton & Bowden
Att: Theo Hamilton, Esquire
Suite 401, Smith Building
Jacksonville 2, Florida

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C.
this 24th day of May, 1956.

(SEAL)

PETITION TO ENFORCE SUBPOENA

On February 21, 1956 PETITION TO ENFORCE SUBPOENA was filed in the words and figures as follows:

In The District Court of The United States
For The Southern District of Florida
Miami Division

National Labor Relations Board,
An Administrative Agency of the Federal Government,
(Petitioner)
versus CIVIL NO. 6759-M

Duval Jewelry Company of Miami, Inc.
a Corporation
(Respondent)

Now comes the National Labor Relations Board, the Petitioner herein, and for this its petition to enforce a subpoena, states that;

1. Petitioner is an administrative agency of the United States Government created pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151, et seq.), hereinafter referred to as the Act.

2. Duval Jewelry Company of Miami, Inc., the Respondent herein, is a corporation duly organized and existing under the laws of the State of Florida, having its principal office at Jacksonville in said state.

3. The Court has jurisdiction of the subject matter of this proceeding under Section 11(2) of the Act [29 USCA 161 (2)] in that the inquiry in aid of which the subpoena hereby sought to be enforced was issued to the Respondent, is and was being carried on within this judicial district.

4. Pursuant to Section 6 of the Act Petitioner has adopted Rules and Regulations (Series 6, effective June 3, 1952) covering the conduct of its operations, which have been duly published in the Federal Register (17 F.R. 4982) as provided for in the Administrative Procedure Act (5 U.S.C. 1002), which Rules and Regulations will be hereinafter referred to as the Rules. Under Section 44 U.S.C. 307 judicial notice may be taken of the Rules.

5. Now and at all times material to the issues herein there is, and was pending before the Petitioner, under Section 9 (c) of the Act, a representation proceeding formerly entitled

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"In the matter of

Duval Jewelry Company of Miami, Inc.
(Employer)
and
Case No. 10-RC-3333

Local 1625, Retail Clerks International Association, AFL
(Petitioner)"

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which was instituted on November 22, 1955, on which date local 1625 Retail Clerks International Association, AFL,

hereinafter referred to as the Union, filed a representation petition in the Petitioner's Tenth Regional Office, and the title to which said proceeding was thereafter changed to

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"In the Matter of

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc., and/or Jenkins & Sons, Inc.; and/or Jenkins Jewelry Company[1]
(Employers)

and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625. AFL-CIO
(Petitioner)

---

[1]An amended petition was filed herein on 1-4-56 to add as an employer Jenkins & Sons, Inc., Jenkins Jewelry Company and Duval Jewelry Company of Miami, Inc."

when the Union filed a first amended representation petition therein on January 4, 1956. A copy of each of said representation petitions marked Exhibits "1" and "2" respectively are hereto attached and hereby made a part hereof.

6. On November 28, 1955, Petitioner issued and served on the parties, its Notice of Representation Hearing in said proceeding in order to investigate the question as to the representation of employees which was raised by the original representation petition above-described, notifying the

parties to said proceeding that a hearing would be held therein on December 5, 1955, a copy of which said Notice of Representation Hearing, marked Exhibit "3", is likewise hereto attached and hereby made a part hereof.

7. On December 2, 1955, Petitioner rescheduled the hearing in said proceeding to December 20, 1955, by its Order Rescheduling Hearing, which was duly served on said parties and a copy of which, marked Exhibit "4", is likewise hereto attached, and hereby made a part hereof.

8. On January 4, 1956, the Petitioner issued and served on the parties its Amended Notice of Representation Hearing in said proceeding and also served on each of said parties a copy of the first amended representation petition theretofore filed by the union, whereby the parties were notified of the amendments to said original representation petition, and that the hearing would be held on January 10, 1956, a copy of said Amended Notice of Representation Hearing, marked Exhibit "5", is likewise hereto attached and hereby made a part hereof.

9. On December 30, 1955, as provided for in Section 11(1) of the Act and by Section 102.31 (a) of the Rules, and at the written request of counsel for the Petitioner's Regional Director for said Region, the Petitioner issued its subpoena duces tecum No. B-25985 directed to the Respondent herein, requiring its attendance and the production of certain of its records at the hearing in said proceeding which was then scheduled for January 10, 1956, or in lieu of appearing and producing said records at the hearing to submit a written statement giving the information sought to be subpoenaed. Said subpoena was duly served upon the

Respondent on January 3, 1956. A true copy of said written request and of the document designating counsel for said Regional Director, marked Exhibits "6" and "7" respectively, are likewise hereto attached and hereby made a part hereof. A true copy of the subpoena duces tecum, together with the United States Marshal's return of service thereof, marked Exhibit "8" is likewise hereto attached and hereby made a part hereof.

10. On January 9, 1956, the Respondent filed its timely petition to revoke the subpoena above-described, and for permission to argue orally and to submit briefs in support of said petition to revoke. A true copy of said petition to revoke, marked Exhibit "9", is likewise hereto attached and hereby made a part hereof.

11. On January 9, 1956, the representation hearing in said proceeding was postponed to February 2, 1956, by a written order duly served on the parties, a true copy of which, marked Exhibit "10", is likewise hereto attached and hereby made a part hereof.

12. On January 9, 1956, the Petitioner's hearing Officer, before whom said proceeding was then pending, granted, by telegram, respondent's request for oral argument and for permission to file briefs in support of its said petition to revoke. A true copy of said telegram marked Exhibit "11" is likewise hereto attached and hereby made a part hereof.

13. On January 26, 1956, the Hearing Officer denied the Respondent's said petition to revoke by a telegraphic order, a true copy of which, marked Exhibit "12", is likewise hereto attached and hereby made a part hereof.

14. On February 2, 1956, the Respondent appeared at said hearing, by its counsel, and refused to respond to said subpoena or to submit the written statement giving the information sought to be subpoenaed.

15. The information sought to be obtained by said subpoena was necessary and relevant to the said representation proceeding in order to determine the extent to which the Respondent's business operations were, either carried on in interstate commerce, or effected such commerce, and to determine its relationship to the other Employers named in said first amended representation petition, so that Petitioner could determine if it will assert its jurisdiction over the Respondent in said representation proceeding.

16. The refusal of the Respondent to produce the records described in said subpoena, or to submit a written statement in lieu of producing the same, constitutes contumacious conduct within the purview of Section 11(2) of the Act, and by thus impeding the Petitioner in the investigation of said representation proceeding now pending, before it, the Respondent has prevented and is preventing the Petitioner from carrying on its duties and functions under the Act.

WHEREFORE, Petitioner, the National Labor Relations Board, respectfully prays:

(a) That an order to show cause issues forthwith directing the Respondent to appear before this Court on a day certain to be fixed in said order, and to show cause, if any there be, why an order should not issue directing it to appear before Petitioner's Hearing Of-

ficer, at such time and place as he may designate, and there produce the records described in said subpoena, and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceeding;

(b) That upon the return of said order to show cause, and order issue requiring the Respondent to appear before said Hearing Officer, at a time and place to be fixed by him, and there produce the records described in said subpoena, and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceeding; and

(c) that Petitioner have such other and further relief as may be necessary and proper.

NATIONAL LABOR
RELATIONS BOARD, Petitioner
By Theophil C. Kammholz
General Counsel

/s/ Lloyd R. Fraker
Lloyd R. Fraker,
Chief Law Officer
Tenth Region
National Labor Relations Board
528 Peachtree-Seventh Building
Atlanta 23, Georgia

/s/ Allen Sinsheimer, Jr.
Allen Sinsheimer, Jr., Attorney
Tenth Region
National Labor Relations Board
Croton Hotel
7326 Collins Avenue
Miami Beach, Florida

EXHIBIT "1"

PETITION

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS. — Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

ATTACHMENTS REQUIRED. — Except when this Petition is filed by an employer under section 9 (c) (1) (b) of the Act, there must be submitted with the Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed

by employees, together with an alphabetical list of their names.

DO NOT WRITE IN THIS SPACE

Case No.
10-Rc-3333

Date filed
11-22-55

Compliance Status Checked by:
/s/ E.F.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. PURPOSE OF THIS PETITION (check only the one box which is appropriate)

A. (X) RC —
CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION). — A substantial number of employees wish to be represented for purposes of collective bargaining, pursuant to Section 9 (a) and (c) of the act.

B. ( ) RM —
REPRESENTATION (EMPLOYER). — One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.

C. ( ) RD —

DECERTIFICATION. — A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9(a) of the act.

D. ( ) UD —

WITHDRAWAL OF UNION SHOP AUTHORITY. — Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

2. NAME OF EMPLOYER
Duval Jewelry Company

EMPLOYER REPRESENTATIVE TO CONTACT
PHONE NO.
35331

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (Street and number, city, zone and State)
226 East Flagler Street, Miami, Florida

4a. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.)
Retail Jewelry Store

4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE
Retail Jewelry

5. DESCRIPTION OF UNIT INVOLVED (If more space is needed, continue on another sheet)

Included All employees working in the company store located at the above address.

Excluded Store Manager, Supervisors, Casual Peak-Season Employees, Guards, Watchmen, Professional Employees as defined in The Act.

6a. NUMBER OF EMPLOYEES IN UNIT
12

6b. IS THIS PETITION SUPPORTED BY 80% OR MORE OF THE EMPLOYEES IN THE UNIT?
(X) YES ( ) NO

(IF YOU HAVE CHECKED BOX 1 A (RC) ABOVE, CHECK AND COMPLETE EITHER ITEM 7A or 7B, WHICHEVER IS APPLICABLE)

7a. ( ) Request for recognition as Bargaining Representative was made on November 19th, 1955 and Employer declined recognition on or about No reply (If no reply received, so state)
(Month, day, year)

7b. ( ) Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. RECOGNIZED OR CERTIFIED BARGAINING AGENT (IF THERE IS NONE, SO STATE)

NAME
None

ADDRESS

Affiliation

Date of Recognition or Certification

9. Date of Expiration or Current Contract, if any (Show month, day and year)
None

10. If you have Checked Box 1 D (UD) above, show here the date of Execution of Agreement Granting Union Shop (month, day and year)

11. PARTIES OR ORGANIZATIONS OTHER THAN PETITIONER WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES, AND OTHER UNIONS INTERESTED IN THE EMPLOYEES DESCRIBED IN ITEM 5 ABOVE (IF NONE, SO STATE)

NAME
None

AFFILIATION

ADDRESS

DATE OF CLAIM
(Required only if Petition is filed by Employer)

12. IF YOU HAVE CHECKED BOX 1 A (RC) above, list locals or other affiliates of Petitioner having or soliciting members among the employees in the unit involved;

or which will serve such employees in the event the Petitioner is certified as their representative (if none, so state)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Retail Clerks, International Association,
Local No. 1625, AFL
(Petitioner and affiliation (if any)

By /s/ Fred J. Khoury
(Signature of representative or person filing petition)

Secretary-Treasurer
(Title, if any)

Address

Fred J. Khoury
732 West Flagler Street, Miami, Florida
(Street and number, city, zone and state)

24947
Telephone number

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001).

EXHIBIT "2"

PETITION

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS — Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

ATTACHMENTS REQUIRED. — Except when this Petition is filed by an employer under section 9 (c) (1) (b) of the Act, there must be submitted with the Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed by employees, together with an alphabetical list of their names.

DO NOT WRITE IN THIS SPACE

Case No.
10*RC-3333

Date filed
1-4-56

Compliance Status Checked by:
/s/ E.F.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. PURPOSE OF THIS PETITION (check only the one box which is appropriate)

A. (X) RC —
CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION). — A substantial number of employees wish to be represented for purposes of collective bargaining, pursuant to Section 9 (a) and (c) of the act.

B. ( ) RM —
REPRESENTATION (EMPLOYER). — One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.

C. ( ) RD —
DECERTIFICATION. — A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9(a) of the act.

D. ( ) UD —
WITHDRAWAL OF UNION SHOP AUTHORITY. — Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and

a labor organization desire that such authority be rescinded.

2. NAME OF EMPLOYER
Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc., and/or Jenkins & Sons, Inc.; and/or Jenkins Jewelry Company.

EMPLOYER REPRESENTATIVE TO CONTACT

PHONE NO.
35331

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (Street and number, city, zone and State)
226 East Flagler Street, Miami, Florida

4a. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.)
Retail Jewelry Store

4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE
Retail Jewelry

5. DESCRIPTION OF UNIT INVOLVED (If more space is needed, continue on another sheet)

Included All employees working in the company store located at the above address.

Excluded Store Manager, Supervisors, Casual Peak-Season Employees, Guards, Watchmen, Professional Employees as defined in The Act.

6a. NUMBER OF EMPLOYEES IN UNIT
12

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?
(X) YES - ( ) NO

(IF YOU HAVE CHECKED BOX 1A (RC) ABOVE, CHECK AND COMPLETE EITHER ITEM 7A or 7B, WHICHEVER IS APPLICABLE)

7a. ( ) Request for recognition as Bargaining Representative was made on November 19th, 1955 and Employer declined recognition on or about No reply (If no reply received, so state) (Month, day, year)

7b. ( ) Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. RECOGNIZED OR CERTIFIED BARGAINING AGENT (IF THERE IS NONE, SO STATE)

NAME
None

ADDRESS

Affiliation

Date of Recognition or Certification

9. Date of Expiration or Current Contract, if any
(Show month. day and year)
None

10. If you have Checked Box 1 D (UD) above, show here the date of Execution of Agreement Granting Union Shop (month, day and year)

11. PARTIES OR ORGANIZATIONS OTHER THAN PETITIONER WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES, AND OTHER UNIONS INTERESTED IN THE EMPLOYEES DESCRIBED IN ITEM 5 ABOVE (IF NONE, SO STATE)

NAME
None

AFFILIATION

ADDRESS

DATE OF CLAIM
(Required only if Petition is filed by Employer)

12. IF YOU HAVE CHECKED BOX 1 A (RC) above, list locals or other affiliates of Petitioner having or soliciting members among the employees in the unit involved; or which will serve such employees in the event the Petitioner is certified as their representative (if none, so state)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Retail Clerks International Association,
Local No. 1625, AFL-CIO
(Petitioner and affiliation, if any)

By /s/ Fred J. Khoury
(Signature of representative or person filing petition)

Secretary-Treasurer
(Title, if any)

Address

Fred J. Khoury
732 West Flagler Street, Miami, Florida
(Street and number, city, zone and state

Franklin 4-4947
Telephone number

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

EXHIBIT "3"

NOTICE OF REPRESENTATION HEARING

United States of America
Before The National Labor Relations Board
Tenth Region

In the Matter of

Duval Jewelry Company of Miami, Inc.
(Employer)

and Case No. 1-RC-3333

Local 1625, Retail Clerks International Association, AFL
(Petitioner)

The Petitioner, above named, having heretofore filed a Petition pursuant to section 9(c) of the National Labor Relations Act, 61 Stat. 136, copy of which Petition is hereby attached, and it appearing that a question affecting commerce has arisen concerning the representation of employees described by such Petition,

YOU ARE HEREBY NOTIFIED that, pursuant to section 9(c) of the Act, on the 5th day of December, 1955, at ten o'clock in the morning, Eastern Standard Time, in the Dade County Courthouse, Miami, Florida, a hearing will be conducted before a hearing officer of the National Labor Relations Board upon the question of representation affecting commerce which has arisen, at which time and place the

parties will have the right to appear in person or otherwise, and give testimony.

IN WITNESS WHEREOF, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Notice of Representation Hearing to be signed by the Regional Director for the Tenth Region on this 28th day of November, 1955.

/s/ John W. Thomas
John W. Thomas,
Acting Regional Director
528 Peachtree-Seventh Building
Atlanta, Georgia

EXHIBIT "4"

ORDER RESCHEDULING HEARING

United States of America
Before The National Labor Relations Board
Tenth Region

In the Matter of

Duval Jewelry Company of Miami, Inc.
(Employer)

and Case No. 10-RC-3333.

Local 1625m Retail Clerks International Association, AFL
(Petitioner)

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from January 10, 1956, to February 2, 1956, at the same hour and place.

DATED at Atlanta, Georgia, this 9th day of January, 1956.

John C. Getreu, Regional Director
National Labor Relations Board
Atlanta, Georgia

EXHIBIT "5"

AMENDED NOTICE OF REPRESENTATION HEARING

United States of America
Before The National Labor Relations Board
Tenth Region

In the Matter of

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc.; and/or Jenkins & Sons, Inc.; and/or Jenkins Jewelry Company[1]

(Employers)

and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625, AFL-CIO

(Petitioner)

The Petitioner, above named, having heretofore filed an Amended Petition pursuant to section 9(c) of the National Labor Relations Act, 61 Stat. 136, copy of which Amended Petition is hereto attached, and it appearing that a question affecting commerce has arisen concerning the representation of employees described by such Petition,

YOU ARE HEREBY NOTIFIED that, pursuant to section 9(c) of the Act, on the 10th day of January, 1956, at ten o'clock in the morning, Eastern Standard Time, in the

---

[1]An amended petition was filed herein on 1-4-56 to add as an employer Jenkins & Sons, Inc., Jenkins Jewelry Company and Duval Jewelry Company of Miami, Inc.

plumbing Industry Program Building, 2526 W. Flagler Street, Miami, Florida, a hearing will be conducted before a hearing officer of the National Labor Relations Board upon the question of representation affecting commerce which has arisen, at which time and place the parties will have the right to appear in person or otherwise, and give testimony.

IN WITNESS WHEREOF, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Notice of Representation Hearing to be signed by the Regional Director for the Tenth Region on this 4th day of January, 1956.

/s/ John C. Getreu
John C. Getreu, Regional Director
528 Peachtree-Seventh Building
Atlanta, Georgia

EXHIBIT "6"

REQUEST FOR SUBPENAS DUCES TECUM

John C. Getreu, Regional Director — December 30, 1955
Frank E. Hamilton, Jr., Acting Chief Law Officer
Duval Jewelry Company of Miami, Inc.
Case No. 10-RC-3333

I hereby request that Subpoenas Duces Tecum issue requiring Duval Jewelry Company of Miami, Inc., 34 W. Forsyth Street, Jacksonville, Florida, Duval Jewelry Company,

34 W. Forsyth Street, Jacksonville, Florida, Jenkins and Sons, Inc., 34 W. Forsyth Street, Jacksonville, Florida, and Oliver A. Jenkins, 34 W. Forsyth Street, Jacksonville, Florida, to produce the following records before the Hearing Officer of the National Labor Relations Board at the Plumbing Industry Program Building, 2526 W. Flagler Street, Miami, Florida, at 10:00 A.M. on January 10, 1956, in the matter of Duval Jewelry Company of Miami, Inc. and Local 1625, Retail Clerks International Association, AFL:

Duval Jewelry Company of Miami, Inc.
34 W. Forsyth Street, Jacksonville, Fla.

1. The books, records and other documents showing all purchases made by said Duval Jewelry Company of Miami, Inc. during the calendar year from January 1, 1955 through December 31, 1955 or during the last fiscal year of said corporation.

2. The corporate stock record books of said Duval Jewelry Company of Miami, Inc., showing all the present shareholders of record and the amount of shares issued to each.

Or in lieu of the foregoing a statement signed and certified to by a responsible official of said corporation setting forth:

1. The total dollar value of purchases made by said corporation during the calendar year from January 1, 1955, through December 31, 1955, or during its last fiscal year, the names of all persons from

whom purchases were made during said period, and the total dollar amount of purchases from each of said persons.

2. The names of all shareholders of said corporation and the number of shares held by each shareholder.

Duval Jewelry Company
34 W. Forsyth Street, Jacksonville, Fla.

1. The books, records and other documents showing all purchases made by said Duval Jewelry Company during the calendar year from January 1, 1955, through December 31, 1955, or during the last fiscal year of said corporation.

2. The books, records and other documents showing all purchases made by said Duval Jewelry Company during the calendar year from January 1, 1955, through December 31, 1955, or during the last fiscal year of said corporation, for or on behalf of each of the following named corporations:

Duval Jewelry Company of Coral Gables, Inc.
Duval Jewelry Company at Eighth and Main
Duval Jewelry Company of Tallahassee
Duval Jewelry Company of Deland
Duval Jewelry Company of Ocala
Duval Jewelry Company of Fort Lauderdale
Duval Jewelry Company of Daytona Beach
Duval Jewelry Company of Gainesville
Duval Jewelry Company of West Palm Beach, Inc.

Duval Jewelry Company of Miami, Inc.
Duval Jewelry Company of Orlando, Inc.
Duval Jewelry Company of Tampa, Inc.
Duval Jewelry Company of St. Petersburg, Inc.
Duval Jewelry Company at Five Points
Duval Jewelry Company at Colonial Plaza

3. The books, records and other documents showing all sales made by said Duval Jewelry Company during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation to the following named corporations:

Duval Jewelry Company of Coral Gables, Inc.
etc. as listed in paragraph 2 above

4. The books, records, and other documents showing amount and extent of shares owned by said Duval Jewelry Company of each of the following-named corporations:

Duval Jewelry Company of Coral Gables, Inc.,
etc. as listed in paragraph 2 above.

or in lieu of the foregoing a statement signed and certified to by a responsible official of said corporation setting forth:

1. The total dollar value of purchases made by said Duval Jewelry Company during the calendar year January 1, 1955 through December 31, 1955, or during its last fiscal year. the names of all persons

from whom purchases were made during said period and the total dollar amount of purchases from each of said persons.

2. The total dollar value of purchases made by said Duval Jewelry Company during the calendar year January 1, 1955 through December 31, 1955, or during its last fiscal year for or on behalf of each of the following named corporations:

Duval Jewelry Company of Coral Gables, Inc.
etc. as listed in paragraph 2

The names of all persons from whom such purchases were made during said period and the total dollar amount of such purchases from each of said persons:

3. The total dollar value of all sales made by said Duval Jewelry Company during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation to each of the following named corporations:

Duval Jewelry Company of Coral Gables, Inc.
etc. as listed in paragraph 2

4. The number of shares owned by said Duval Jewelry Company of each of the following named corporations, and the total number of shares issued by each of these corporations:

Duval Jewelry Company of Coral Gables, Inc. etc. as listed in paragraph 2

Jenkins and Sons, Inc.
34 West Forsyth Street, Jacksonville, Fla.

Same subpena duces tecum as Duval Jewelry Company with following differences:

1. Name Jenkins and Sons, Inc. to be in place of Duval Jewelry Company wherever it appears.

2. When copying list of Secretary of State, attached, all names thereon including Duval Jewelry Company are to be copied.

Oliver A. Jenkins
34 W. Forsyth Street
Jacksonville, Florida

1. All shares of stock and other evidences of beneficial interest which the aforesaid Oliver A. Jenkins owns in each of the following-named corporations:

1. Jenkins and Sons (name as telephoned in to Hamilton or Fraker) and then list all companies named on letter of Secretary of State attached.

or in lieu of producing the foregoing to produce a statement signed and certified to by said Oliver A. Jenkins setting forth (1) the number of shares of stock owned

by said Oliver A. Jenkins in each of the following named corporations:

1. Jenkins and Sons, Inc, and list all corporations named in Secretary of State's letter attached.

2. All other beneficial interest which said Oliver A. Jenkins has in each of the corporations listed aforesaid above.

— /s/ . FEH
F. E. H., Jr.

Approved:

/s/ John C. Getreu
Regional Director

December 30, 1955

P.S. The name Jenkins & Son, Inc. and Jenkins Jewelry Company should be added to the listing of corporations in paragraph 2 of the subpena to Duval Jewelry Company and to paragraph 2 of the "in lieu" section of the subpena to Duval Jewelry Company. Jenkins Jewelry Company should be added to the listing of companies in the subpena to Oliver A. Jenkins and in the "in lieu" section of the subpena to Oliver A. Jenkins.

EXHIBIT "7"

Office Memorandum — United States Government
DATE December 30, 1955

TO: Frank E. Hamilton, Jr., Attorney

FROM: John C. Getreu, Regional Director

SUBJECT: Duval Jewelry Company of Miami, Inc.
Case No. 10-RC-3333

You are hereby designated to act as my attorney in the above-styled case.

J. C. G.

EXHIBIT "8"

NLRB-31
(8-50)

SUBPENA DUCES TECUM

United States of America
National Labor Relations Board

To: Duval Jewelry Company of Miami, Inc.
34 W. Forsyth Street, Jacksonville, Florida

Request therefor having been duly made by FRANK E. HAMILTON, JR., Attorney, whose address is 50 Seventh St., N. E., Atlanta 23, Georgia.

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE a hearing officer of the National Labor Relations Board, at Plumbing Industry Program Building, 2526 W. Flagler Street in the City of Miami, Florida, on the 10th day of January, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Duval Jewelry Company of Miami, Inc. and Local 1625, Retail Clerks International Association, AFL — Case No. 10-RC-3333.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence and documents:

1. The books, records and other documents showing all purchases made by said Duval Jewelry Company of Miami, Inc. during the calendar year from January 1, 1955 through December 31, 1955 or during the last fiscal year of said corporation.

2. The corporate stock record books of said Duval Jewelry Company of Miami, Inc., showing all the present shareholders of record and the amount of shares issued to each.

Or in lieu of the foregoing a statement signed and certified to by a responsible official of said corporation setting forth —

1. The total dollar value of purchases made by said corporation during the calendar year from January 1, 1955, through December 31, 1955, or during its last fiscal year, the names of all persons from whom purchases

were made during said period, and the total dollar amount of purchases from each of said persons.

2. The names of all shareholders of said corporation and the number of shares held by each shareholder.

B - 25985

In testimony whereof the seal of the National Labof Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at ATLANTA 23, GEORGIA, this 30th day of December, 1955.

/s/ Abe Murdock

NOTICE TO WITNESSES — Witness fees for attendance, subsistence, and mileage under this subpena are payable by the party at whose request the witness is subpenaed. a Witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpena with the voucher when claiming reimbursement.

RETURN OF UNITED STATES MARSHAL SOUTHERN DISTRICT OF FLORIDA EXECUTED THIS WRIT AT Jacksonville, FLORIDA, ON January 3, 1956, BY SERVING THE WITHIN NAMED Duval Jewelry Co. of Miami, Inc., A CORPORATION BY DELIVERING A COPY OF THIS SUMMONS TOGETHER WITH COPY OF COMPLAINT TO L. K. Maxwell, AN OFFICER OF THE SAID Duval Jewelry Co. of Miami, Inc., A CORPORATION.

FEE	$ .50	THOMAS H. TRENT,
MILEAGE	.10	UNITED STATES MARSHAL
		BY:
TOTAL	.60	/s/ Jerry D. Dragones, Deputy.

EXHIBIT "9"

PETITION TO REVOKE SUBPENA

United States of America
Before The National Labor Relations Board

In the Matter of:

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc.; and/or Jenkins & Sons, Inc. and/or Jenkins Jewelry Company
(Employers)

and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1725 AFL-CIO
(Petitioner)

COMES NOW, Duval Jewelry Company of Miami, Inc., a corporation by its undersigned counsel, and petitions the National Labor Relations Board to revoke Subpena No. B-25985, addressed to said corporation, upon the following grounds, to-wit:

1. Said subpena is oppressive and unreasonable in that it requires the production of records or statements of all purchases made by said company for an entire year and the names of all current shareholders of said corporation on January 10, 1956, in a city 350 miles away from the offices of said company.

2. Said subpena seeks evidence which is immaterial and irrelevant to any proper issue in the above styled cause.

3. Duval Jewelry Company of Miami, Inc. is not subject to the jurisdiction of the National Labor Relations Board.

4. It does not appear that the said subpena was duly and properly issued according to law.

5. It does not appear that the said subpena was duly and properly issued according to the Rules and Regulations of the National Labor Relations Board.

6. Said subpena seeks evidence which does not relate to any matter under investigation or in question in the above styled cause.

7. The National Labor Relations Board has no jurisdiction in this cause.

8. Duval Jewelry Company of Miami, Inc. is not the employer of any employees involved in this cause.

9. There is no cause pending before the National Labor Relations Board entitled "in the Matter of Duval Jewelry Company of Miami, Inc. and Local 1625, Retail Clerks International Association, AFL, Case No. 10 - RC - 3333" as stated in said subpena.

Petitioner hereby requests opportunity, when reasonable notice, to orally argue this petition and any answer thereto and any issues involved herein, and thereafter the opportunity to file a written brief upon said issues.

RESPECTFULLY SUBMITTED this 7th day of January, 1956.

HAMILTON & BOWDEN
By /s/ Theo Hamilton
(Theo Hamilton)
Attorneys for said Petitioner

Address of Counsel:
Hamilton & Bowden
Suite 401, Smith Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of January, 1956, mailed the foregoing Petition to Revoke Subpena to:

National Labor Relations Board
Washington, D. C.

Allen Sinsheimer, Jr., Esq.
Hearing Officer
National Labor Relations Board,
Tenth Region
50 Seventh Street, N. E.
Atlanta 23, Georgia

/s/ Theo Hamilton
(Theo Hamilton)

EXHIBIT "10"

ORDER RESCHEDULING HEARING

United States of America
Before The National Labor Relations Board
Tenth Region

In the Matter of

Duval Jewelry Company of Miami, Inc.
(Employer)

and Case No. 10-RC-3333

Local 1625, Retail Clerks International Association, AFL
(Petitioner)

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from December 5, 1955 to December 20, 1955, at the same hour and place.

DATED at Atlanta, Georgia, this 2nd day of December, 1955.

/s/ Lloyd R. Fraker
Lloyd R. Fraker,
Acting Regional Director
National Labor Relations Board
Atlanta, Georgia

EXHIBIT "11"

TELEGRAM

NLRB - Atlanta
LRF/eb
1-9-56

DUVAL JEWELRY COMPANY OF MIAMI, INC.
226 E. FLAGLER STREET
MIAMI, FLORIDA

LOCAL 1625, RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO
732 WEST FLAGLER ST.
MIAMI, FLORIDA

DUVAL JEWELRY COMPANY
34 W. FORSYTH STREET
JACKSONVILLE, FLORIDA

JENKINS AND SONS, INC.
34 W. FORSYTH STREET
JACKSONVILLE, FLORIDA

JENKINS JEWELRY COMPANY
34 W. FORSYTH STREET
JACKSONVILLE, FLORIDA

MR. THEO. HAMILTON, ATTORNEY
401 SMITH BUILDING
JACKSONVILLE, FLORIDA

RE: DUVAL JEWELRY COMPANY OF MIAMI, INC.,
ET AL., 10RC-3333. THE REQUESTS OF COUNSEL FOR

THE EMPLOYER TO SUBMIT A BRIEF AND FOR PERMISSION TO ARGUE ORALLY IN SUPPORT OF ITS MOTIONS TO REVOKE SUBPENAS HEREIN, ARE HEREBY GRANTED. BRIEFS, EITHER TYPEWRITTEN OR OTHERWISE DUPLICATED, SHALL BE SUBMITTED TO THE UNDERSIGNED HEARING OFFICER ON OR BEFORE JANUARY 17, 1956, AT THE CROTON HOTEL, 73RD AND COLLINS STREETS, MIAMI BEACH, FLORIDA, AND ORAL ARGUMENT SHALL BE PRESENTED BEFORE ME AS SUCH HEARING OFFICER AT 2:00 O'CLOCK P.M., EASTERN STANDARD TIME, ON JANUARY 19, 1956, AT THE PLUMBING INDUSTRY PROGRAM BUILDING, 2526 W. FLAGLER STREET, AT MIAMI, FLORIDA.

/s/ Allen Sinsheimer, Jr.
ALLEN SINSHEIMER, JR.
HEARING OFFICER

EXHIBIT "12"

TELEGRAM

NLRB - Atlanta LRF - eb
1-26-56

DUVAL JEWELRY COMPANY OF MIAMI, INC.
226 E. FLAGLER ST.
MIAMI, FLORIDA

LOCAL 1625, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO
732 WEST FLAGLER STREET
MIAMI, FLORIDA

DUVAL JEWELRY COMPANY
34 W. FORSYTH STREET
JACKSONVILLE, FLORIDA

JENKINS AND SONS, INC.
34 W. FORSYTH STREET
JACKSONVILLE, FLORIDA

JENKINS JEWELRY COMPANY
34 W. FORSYTH STREET
JACKSONVILLE, FLORIDA

MR. THEO HAMILTON, ATTORNEY
401 SMITH BUILDING
JACKSONVILLE, FLORIDA

RE: DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL., 10RC-3333. NO BRIEF HAVING BEEN RECEIVED AND THE PETITIONS TO REVOKE SUPPOENAS NO. B-25988 TO JENKINS JEWELRY COMPANY, B-25986 TO DUVAL JEWELRY COMPANY, B-25987 TO JENKINS & SONS, INC., B-25985 TO DUVAL JEWELRY COMPANY OF MIAMI, INC., B-25989 TO OLIVER A. JENKINS AND A-75787 TO OLIVER A. JENKINS HAVING BEEN CAREFULLY CONSIDERED, ARE HEREBY DENIED FOR THE REASON THAT SAID PETITIONS RAISE NO SUBSTANTIAL ISSUE AS TO THE VALIDITY OF SAID SUBPOENAS. UPON AGREEMENT OF THE EMPLOYERS AND OF THE WITNESSES NAMED IN SAID SUBPOENAS TO COMPLY THEREWITH AND UPON THE EMPLOYER'S REQUEST TO THE HEARING OFFICER AT THE CROTON HOTEL, 7326 COLLINS AVE. IN MIAMI BEACH, FLORIDA, BE-

FORE 5:00 P.M., ON JANUARY 27, 1956, THE HEARING NOW SCHEDULED FOR FEBRUARY 2, 1956, IN MIAMI, FLORIDA, WILL BE RESCHEDULED FOR FEBRUARY 2, 1956, IN JACKSONVILLE, FLORIDA, FOR THE PURPOSE OF TAKING TESTIMONY AND OTHER EVIDENCE AS TO THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD IN THIS CASE, AND ON SUCH OTHER ISSUES AS THE HEARING OFFICER OR THE PARTIES MAY DESIRE, AT WHICH TIME AND PLACE ALL OF SAID SUBPOENAS MAY BE COMPLIED WITH, SUBJECT TO FURTHER ADJOURNMENT OF THE HEARING TO MIAMI, FLORIDA, AT SUCH LATER DATE AS THE HEARING OFFICER MAY DIRECT. IN THE EVENT OF A CHANGE OF THE PLACE OF HEARING TO JACKSONVILLE, FLORIDA, THE HEARING OFFICER WILL NOTIFY THE PARTIES PROMPTLY BY TELEPHONE OR TELEGRAPH AS TO THE PLACE AND HOUR WHERE IT WILL BE CONDUCTED IN SAID CITY.

Allen Sinsheimer, Jr.
Hearing Officer

ORDER TO SHOW CAUSE

On February 21, 1956 ORDER TO SHOW CAUSE was filed in the words and figures as follows:

(CAPTION OMITTED)

Petitioner having filed its petition here[illegible] for an order

requiring Duval Jewelry Company of Miami, Inc., the Respondent, to obey a certain subpoena duces tecum, and the Court having duly considered the same, it is hereby,

ORDERED, that the Respondent appear in this Court at Miami, Florida on the 2nd day of March, 1956, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, and show cause, if any there be, why the prayer of said petition should not be granted, and it is hereby further,

ORDERED, that this order and the petition on which it is based be served on the Respondent, on or before February 25th, 1956, and that the Respondent shall file and serve its answer to the petition not later than March 1st, 1956. Service of this order, of the petition herein, and of the Respondent's answer, in any manner provided by the Rules of Civil Procedure for the District Courts of the United States, or by registered or certified mail, shall constitute good and sufficient service.

Issued at Miami, Florida, this 21 day of February, 1956.

EMETT C. CHOATE
Judge of the District Court of the
United States for the Southern
District of Florida

ANSWER OF RESPONDENT

On March 2, 1956 ANSWER OF RESPONDENT was filed in the words and figures as follows:

(CAPTION OMITTED)

Comes now DUVAL JEWELRY COMPANY OF MIAMI, INC., a corporation (hereinafter called the Respondent) by its undersigned counsel, and files this Answer to the Petition to Enforce Subpoena heretofore filed herein and answering, says:

I.

The Respondent admits the material allegations contained in Paragraphs numbered 1, 2, 3, 4, 5, 6, 7 and 8 of said Petition.

II.

The Respondent, answering Paragraph 9 of said Petition, asserts and alleges that Respondent is without knowledge of the allegations contained in said Paragraph 9 except that Respondent admits service of said subpoena or subpoenas upon Respondent as alleged.

III.

The Respondent admits the material allegations of Paragraphs 10 and 11 of said Petition.

IV.

The Respondent denies the allegations of Paragraph 12 of said Petition and further answering said Paragraph 12 Respondent asserts and alleges that the matter of the revocation of said subpoena or subpoenas was not properly before the Petitioner's Hearing Officer but had been presented to Petitioner.

V.

The Respondent, answering Paragraph 13 of said Petition, asserts and alleges that the said Hearing Officer attempted to rule upon Respondent's petition to revoke but that said Hearing Officer did not have the power, jurisdiction or authority to rule upon said petition to revoke nor to issue an order or decision denying said petition to revoke, as will more particularly hereinafter appear.

VI.

The Respondent admits the material allegations of Paragraph 14 of said Petition.

The Respondent, answering Paragraph 15 of said Petition, denies that the information sought by said subpoena or said subpoenas is necessary or relevant to the said representation proceeding as alleged in said Paragraph 15.

VIII.

The Respondent denies the material allegations of Paragraph 16 of said Petition.

IX.

The Respondent, further answering said Petition, and each and every material allegation thereof, asserts and alleges:

1. The said subpoena or subpoenas were not issued by the National Labor Relations Board, or any member thereof, upon application of any party to the said representation proceeding as required by Section 11 of the Labor Management Relations Act, 1947. The said subpoena or subpoenas show upon their face that the request for issuance was made by a person not a party to the said proceeding.

2. The Respondent duly filed a petition to revoke the said subpoena or subpoenas with the National Labor Relations Board the Petitioner herein, as required by said Section 11 of said Act, and the said National Labor Relations Board has failed and refused to rule upon said petition to revoke.

3. The said Hearing Officer in said representation proceeding has no power, jurisdiction nor authority to rule upon petitions to revoke subpoenas, this power, jurisdiction and authority being reserved solely and exclusively to the National Labor Relations Board under Section 11 of said Act and is not delegable to any agent or agency of said Board.

4. Said subpoena or subpoenas were not issued according to law, in that there is no authority in the Labor Management Relations Act, 1947, or in any other law applicable to National Labor Relations Board representation hearings, or in any of the Federal Rules of Civil Procedure author-

izing the issuance of subpoenas in National Labor Relations Board representation proceeding or enforcement by this Court of subpoenas framed in the alternative, calling for the preparation and production of an unsworn statement by an unidentified person which written statement would not be legal and proper evidence and would not be admissible.

5. On January 3, 1956, service was made of subpoenas duces tecum on Duval Jewelry Company, Duval Jewelry Company of Miami, Inc., Jenkins Jewelry Company and Jenkins and Sons, Inc., and on January 6, 1956, service was made of subpoenas upon Oliver A. Jenkins personally and as President of Duval Jewelry Company, all of said subpoenas requiring the production, at the same time, at a hearing on January 10, 1956, in a city 350 miles away from the principal offices of each of said corporations, of all records or statements showing all purchases made by and all sales made to or on behalf of some eighteen corporations operating sixteen retail jewelry stores throughout the State of Florida in the cities of Coral Gables, Miami, Jacksonville, Tallahassee, DeLand, Ocala, Fort Lauderdale, Daytona Beach, Gainesville, West Palm Beach, Orlando, Tampa and St. Petersburg. To comply with said subpoenas would require the production of all operating books of these several corporations, amounting to scores of ledgers and other books and records, and thousands of individual cards, which would be in the hands of the National Labor Relations Board for an indefinite period of time and to compile statements showing data to be produced would require approximately eight weeks time, since sales and purchases of the said several corporations involve thousands of transactions over a year's time. The Respondent asserts and alleges that there is only one retail store involved in the National Labor

Relations Board proceeding; that said retail store is operated in the City of Miami, Florida, by Duval Jewelry Company of Miami, Inc., a Florida corporation and that there are no employees of any other corporation involved in the said National Labor Relations Board proceeding; that the National Labor Relations Board is attempting a mere "fishing expedition" into the records of all eighteen corporations, wherever located, for the purpose of trying to find some basis of asserting jurisdiction. The Respondent asserts, and the Petitioner well knows, that the Petitioner has no jurisdiction over the single retail store in the City of Miami, involved in the hearing.

6. The said subpoena requires the production of date not material or relevant to any issue in said representation hearing and seeks evidence which does not relate to any matter under investigation or in question in said hearing, to-wit: The identity of suppliers of all purchases made by Respondent, and the amount of each purchase.

7. The said subpoena is oppressive and unreasonable within meaning of Rule 45 b of the Federal Rules of Civil Procedure, in that it required the production of all records showing, or statements showing, the names of all current shareholders and number of shares held by each shareholder and showing each and every purchase made by Respondent company for an entire year, the names of each and every person from whom purchases were made and the total dollar amount of purchases from each person, at a hearing in a city 350 miles away from the principal office of said Respondent company within a period of less than six working days from time of service of said subpoena.

Wherefore, having fully answered said Petition, Respondent respectfully prays that the Court will

(1) Deny the prayers of said Petition;

(2) Enter an order quashing said subpoena or subpoenas.

Respectfully submitted this 1st day of March, 1956.

HAMILTON & BOWDEN
By /s/ Theo Hamilton
(Theo Hamilton)
Counsel for Respondent

Address of Counsel for Respondents:

Hamilton & Bowden
401 Smith Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 1956, filed the foregoing Answer in this Court and served a copy thereof by registered United States Mail upon the following:

National Labor Relations Board
Washington, D. C.

Lloyd R. Fraker, Esq.
Chief Law Officer
Tenth Region
National Labor Relations Board
528 Peachtree-Seventh Building
Atlanta, Georgia

Allen Sinsheimer Jr., Esq.
Attorney
Tenth Region
National Labor Relations Board
Croton Hotel
7326 Collins Avenue
Miami Beach, Florida

/s/ Theo Hamilton
(Theo Hamilton)
of Counsel for Respondent

PETITION TO ENFORCE SUBPOENA

On February 21, 1956 PETITION TO ENFORCE SUBPOENA was filed in the words and figures as follows:

In The District Court of the United States
For The Southern District of Florida
Miami Division

National Labor Relations Board,
An Administrative Agency of the
Federal Government
(Petitioner)

vs: Civil No. 6760-M

Duval Jewelry Company, a Corporation
(Respondent)

Now comes the National Labor Relations Board, the Petitioner herein, and for this its petition to enforce a subpoena, states that:

1. Petitioner is an administrative agency of the United States Government created pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V. Sec. 151, et. seq.), hereinafter referred to as the Act.

2. Duval Jewelry Company, the Respondent herein is a corporation duly organized and existing under the laws of the State of Florida, having its principal office at Jacksonville in said state.

3. The Court has jurisdiction of the subject matter of this proceeding under Section 11(2) of the Act [29 USCA 161 (2)] in that the inquiry in aid of which the subpoena hereby sought to be enforced was issued to the Respondent, is and was being carried on within this judicial district.

4. Pursuant to Section 6 of the Act Petitioner has adopted Rules and Regulations (Series 6, effective June 3, 1952), covering the conduct of its operations, which have been duly published in the Federal Register (17 F.R. 4982) as provided for in the Administrative Procedure Act (5 U.S.C. 1002), which Rules and Regulations will be hereinafter referred to as the Rules. Under Section 44 U.S.C. 307 Judicial notice may be taken of the Rules.

5. Now and at all times material to the issues herein there is, and was pending before the Petitioner, under Section 9(c) of the Act, a representation proceeding formerly entitled

"In the matter of

Duval Jewelry Company of Miami, Inc.
(Employer)
and Case No. 10*RC-3333

Local 1625, Retail Clerks International
Association, AFL
(Petitioner)"

which was instituted on November 22, 1955, on which date Local 1625, Retail Clerks International Association, AFL, hereinafter referred to as the Union, filed a representation

petition in the Petitioner's Tenth Regional Office, and the title to which said proceeding was thereafter changed to

"In the matter of

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc.; and/or Jenkins & Sons, Inc.; and/or Jenkins Jewelry Company[1]

(Employers)

and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625, AFL-CIO

(Petitioner)

[1]An amended petition was filed herein on 1-4-56 to add as an employer Jenkins & Sons, Inc., Jenkins Jewelry Company and Duval Jewelry Company of Miami, Inc."

when the union filed a first amended representation petition therein on January 4, 1956. A copy of each of said representation petitions marked Exhibits "1" and "2" respectively are hereto attached and hereby made a part hereof.

6. On November 28, 1955, Petitioner issued and served on the parties, its Notice of Representation Hearing in said proceeding in order to investigate the question as to the representation of employees which was raised by the original representation petition above-described, notifying the parties to said proceeding that a hearing would be held therein on December 5, 1955, a copy of which said Notice of

Representation Hearing, marked Exhibit "3", is likewise hereto attached and hereby made a part hereof.

7. On December 2, 1955, Petitioner, rescheduled the hearing in said proceeding to December 20, 1955, by its Order Rescheduling Hearing, which was duly served on said parties and a copy of which, marked Exhibit "4", is likewise hereto attached, and hereby made a part hereof.

8. On January 4, 1956, the Petitioner issued and served on the parties its Amended Notice of Representation Hearing in said proceeding and also served on each of said parties a copy of the first amended representation petition theretofore filed by the union, whereby the parties were notified of the amendments to said original representation petition, and that the hearing would be held on January 10, 1956, a copy of said Amended Notice of Representation Hearing, marked Exhibit "5" is likewise hereto attached and hereby made a part hereof.

9. On December 30, 1955, as provided for in Section 11(1) of the Act and by Section 102.31 (a) of the Rules, and at the written request of counsel for the Petitioner's Regional Director for said Region, the Petitioner issued its subpoena duces tecum No. 25986 directed to the Respondent herein, requiring its attendance and the production of certain of its records at the hearing in said proceeding which was then scheduled for January 10, 1956, or in lieu of appearing and producing said records at the hearing to submit a written statement giving the information sought to be subpoenaed. Said subpoena was duly served upon the Respondent on January 3, 1956. A true copy of said written request and of the document designating counsel for said

Regional Director, marked Exhibits "6" and "7" respectively, are likewise hereto attached and hereby made a part hereof. A true copy of the subpoena duces tecum, together with the United States Marshal's return of service thereof, marked Exhibit "8" is likewise hereto attached and hereby made a part hereof.

10. On January 9, 1956, the Respondent filed its timely petition to revoke the subpoena above-described, and for permission to argue orally and to submit briefs in support of said petition to revoke. A true copy of said petition to revoke, marked Exhibit "9" is likewise hereto attached and hereby made a part hereof.

11. On January 9, 1956 the representation hearing in said proceeding was postponed to February 2, 1956, by a written order duly served on the parties, a true copy of which, marked Exhibit "10", is likewise hereto attached and hereby made a part hereof.

12. On January 9, 1956, the Petitioner's Hearing Officer, before whom said proceeding was then pending, granted, by telegram, respondent's request for oral argument and for permission to file briefs in support of its said petition to revoke. A true copy of said telegram, marked Exhibit "11", is likewise hereto attached and hereby made a part hereof.

13. On January 26, 1956, the Hearing Officer denied the Respondent's said petition to revoke by a telegraphic order, a true copy of which, marked Exhibit "12" is likewise hereto attached and hereby made a part hereof.

14. On February 2, 1956, the Respondent appeared at said hearing, by its counsel, and refused to respond to said subpoena or to submit the written statement giving the information sought to be subpoenaed.

15. The information sought to be obtained by said subpoena was necessary and relevant to the said representation proceeding in order to determine the extent to which the Respondent's business operations were, either carried on in interstate commerce, or affected such commerce, and to determine its relationship to the other Employers named in said first amended representation petition, so that Petitioner could determine if it will assert its jurisdiction over the Respondent in said representation proceeding.

16. The refusal of the Respondent to produce the records described in said subpoena, or to submit a written statement in lieu of producing the same, constitutes contumacious conduct with the purview of Section 11(2) of the Act, and by thus impeding the Petitioner in the investigation of said representation proceeding now pending before it, the Respondent has prevented and is preventing the Petitioner from carrying on its duties and functions under the Act.

WHEREFORE, Petitioner, the National Labor Relations Board, respectfully prays:

(a) That an order to show cause issue forthwith directing the Respondent to appear before this Court on a day certain to be fixed in said order, and to show cause, if any there be, why an order should not issue directing it to appear before Petitioner's

Hearing Officer, at such time and place as he may designate, and there produce the records described in said subpoena, and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceeding;

(b) That upon the return of said order to show cause, and order issue requiring the Respondent to appear before said Hearing Officer, at a time and place to be fixed by *by* him, and there produce the records described in said subpoena, and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceeding; and

(c) that Petitioner have such other and further relief as may be necessary and proper.

NATIONAL LABOR
RELATIONS BOARD, Petitioner
By Theophil C. Kammholz
General Counsel

/s/ Lloyd R. Fraker
Lloyd R. Fraker,
Chief Law Officer
Tenth Region
National Labor Relations Board
528 Peachtree-Seventh Building
Atlanta 23, Georgia

/s/ Allen Sinsheimer, Jr.
Allen Sinsheimer, Jr., Attorney
Tenth Region
National Labor Relations Board
Croton Hotel
7326 Collins Avenue
Miami Beach, Florida

EXHIBIT "8"

NLRB-31
(8-50)

SUBPENA DUCES TECUM

United States of America
National Labor Relations Board

To Duval Jewelry Company
34 W. Forsyth Street, Jacksonville, Florida

Request therefor having been duly made by Frank E. Hamilton, Jr., Attorney whose address is 50 Seventh St
(Street)
N. E. Atlanta 23, Georgia
(City) (State)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE a hearing officer of the National Labor Relations Board, at Plumbing Industry Program Building, 2526 W. Flagler Street in the City of Miami, Florida on the 10th day of January, 1956 at 10:00 o'clock a.m. of that day, to testify in the Matter of Duval Jewelry Company of Mi-

ami, Inc. and Local 1625, Retail Clerks International Association, AFL, Case No. 10-RC-3333

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. The books, records and other documents showing all purchases made by said Duval Jewelry Company during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation,

2. The books, records and other documents showing all purchases made by said Duval Jewelry Company during the calendar year from January 1, 1955 through December 31, 1955 or during the last fiscal year of said corporation, for or on behalf of each of the following named corporations:

Duval Jewelry Company of Coral Gables, Inc.
Duval Jewelry Company at Eighth and Main
Duval Jewelry Company of Tallahassee
Duval Jewelry Company of Deland
Duval Jewelry Company of Ocala
Duval Jewelry Company of Fort Lauderdale
Duval Jewelry Company of Daytona Beach
Duval Jewelry Company of Gainesville
Duval Jewelry Company of West Palm Beach, Inc.
Duval Jewelry Company of Miami, Inc.
Duval Jewelry Company of Orlando, Inc.

Duval Jewelry Company of Tampa, Inc.
Duval Jewelry Company of St. Petersburg, Inc.
Duval Jewelry Company at Five Points
Duval Jewelry Company at Colonial Plaza

3. The books, records and other documents showing all sales made by said Duval Jewelry Company during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation to the following named corporations:

Duval Jewelry Company of Coral Gables, etc.
as listed in paragraph 2 above.

4. The books, records, and other documents showing amount and extent of shares owned by said Duval Jewelry Company of each of the following-named corporations:

Jenkins and Sons, Inc.
Jenkins Jewelry Company
Duval Jewelry Company of Coral Gables, Inc.
etc. as listed in paragraph 2 above.

or in lieu of the foregoing a statement signed and certified to by a responsible official of said corporation setting forth:

1. The total dollar value of purchases made by said Duval Jewelry Company during the calendar year January 1, 1955 through December 31, 1955, or during its last fiscal year, the names of all persons from whom purchases were made during said period and

the total dollar amount of purchases from each of said persons.

2. The total dollar value of purchases made by said Duval Jewelry Company during the calendar year January 1, 1955 through December 31, 1955, or during its last fiscal year for or on behalf of each of the following named corporations:

Jenkins and Sons, Inc.
Jenkins Jewelry Company
Duval Jewelry Company of Coral Gables, Inc.,
etc. as listed in paragraph 2 above.

The names of all persons from whom such purchases were made during said period and the total dollar amount of such purchases from each of said persons:

3. The total dollar value of all sales made by said Duval Jewelry Company during the calendar year from January 1, 1955, through December 31, 1955, or during the last fiscal year of said corporation to each of the following-named corporations:

Jenkins and Sons, Inc.
Jenkins Jewelry Company
Duval Jewelry Company of Coral Gables, Inc.,
etc. as listed in paragraph 2

4. The number of shares owned by said Duval Jewelry Company of each of the following-named corporations, and the total number of shares issued by each of these corporations:

Jenkins and Sons, Inc.
Jenkins Jewelry Company
Duval Jewelry Company of Coral Gables, Inc.,
etc. as listed in paragraph 2 above.

B-25986

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Atlanta, Georgia this 30th day of December, 1955.

/s/ Abe Murdock

NOTICE TO WITNESS — Witness fees for attendance, subsistence, and mileage, under this subpena are payable by the party at whose request the witness is subpenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpena with the voucher when claiming reimbursement.

RETURN OF UNITED STATES MARSHAL SOUTHERN DISTRICT FLORIDA EXECUTED THIS WRIT AT JACKSONVILLE, FLORIDA, ON JAN. 3, 1956, BY SERVING THE WITHIN-NAMED DUVAL JEWELRY CO., A CORPORATION, BY DELIVERING A COPY OF THIS SUMMONS TOGETHER WITH COPY OF COMPLAINT TO L. K. MAXWELL, AN OFFICER OF THE SAID _____, A CORPORATION.

THOMAS H. TRENT,
UNITED STATES MARSHAL
BY: /s/ Jerry D. Dragones
Deputy

FEE	$ .50
MILEAGE	.10
TOTAL	.60

EXHIBIT "9"

PETITION TO REVOKE SUBPENA

United States of America
Before The National Labor Relations Board

In the Matter of:

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc.; and/or Jenkins & Sons, Inc. and/or Jenkins Jewelry Company

(Employers)

and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625, AFL-CIO

(Petitioner)

COMES NOW, Duval Jewelry Company, a corporation, by its undersigned counsel, and petitions the National Labor Relations Board to revoke Subpena No. B-25986, addressed to said corporation, upon the following grounds, to-wit:

1. Said subpena is oppressive and unreasonable in that it requires on January 10, 1956, in a city 350 miles away from the offices of said company, the production of records or statements of all purchases made by and sales made to or on behalf of some 15 corporations scattered throughout the State of Florida which operate sixteen retail jewelry stores throughout the State of Florida.

2. Said subpena seeks evidence which is immaterial and irrelevant to any proper issue in the above styled cause.

3. Duval Jewelry Company is not subject to the jurisdiction of the National Labor Relations Board.

4. It does not appear that the said subpena was duly and properly issued according to law.

5. It does not appear that the said subpena was duly and properly issued according to the Rules and Regulations of the National Labor Relations Board.

6. Duval Jewelry Company has no interest in these proceedings.

7. Said subpena seeks evidence which does not relate to any matter under investigation or in question in the above styled cause.

8. The National Labor Relations Board has no jurisdiction in this cause.

9. Duval Jewelry Company is not the employer of any employees involved in this cause.

10. There is no cause pending before the National Labor Relations Board entitled "in the matter of Duval Jewelry Company of Miami, Inc. and Local 1625, Retail Clerks International Association, AFL, Case No. 10-RC-3333", as stated in said subpena.

Petitioner hereby requests opportunity, upon reasonable notice, to orally argue this petition and any answer thereto and any issues involved herein, and thereafter the opportunity to file a written brief upon said issues.

RESPECTFULLY SUBMITTED this 7th day of January, 1956.

HAMILTON & BOWDEN
By /s/ Theo Hamilton
(Theo Hamilton)
Attorneys for said Petitioner

Address of Counsel:

Hamilton & Bowden
Suite 401, Smith Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of January, 1956, mailed the foregoing Petition to Revoke Subpena to.

National Labor Relations Board
Washington, D. C.

Allen Sinsheimer, Jr., Esq.
Hearing Officer
National Labor Relations Board, Tenth Region
50 Seventh Street, N. E.
Atlanta 23, Georgia

/s/ Theo Hamilton
(Theo Hamilton)

RECITATION — Civil 6760-M:

The Exhibits being numbered from 1 to 7 inclusive, and 10 to 12 inclusive, which are attached to the petition to enforce subpoena in Civil 6760-M are one and the same as attached to the petition in 6759-M-Civil and found on page 13 of this record.

ORDER TO SHOW CAUSE

On February 21, 1956 ORDER TO SHOW CAUSE was filed in the words and figures as follows:

(CAPTION OMITTED)

Petitioner having filed its petition herein for an order requiring Duval Jewelry Company, the Respondent, to obey a certain subpoena duces tecum, and the Court having duly considered the same, it is hereby,

ORDERED, that the Respondent appear in this Court at Miami, Florida, on the 2nd day of March, 1956, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, and show cause, if any there be, why the prayer of said petition should not be granted; and it is hereby further,

ORDERED, that this order and the petition on which it is based be served on the Respondent, on or before February 25th, 1956 and that the Respondent shall file and serve its answer to the petition not later than March 1st, 1956.

Service of this order, of the petition herein, and of the Respondent's answer, in any manner provided by the Rules of Civil Procedure for the District Courts of the United States, or by registered or certified mail, shall constitute good and sufficient service.

Issued at Miami, Florida, this 21 day of February, 1956.

EMETT C. CHOATE
Judge of the District Court of the United States for the Southern District of Florida

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ANSWER OF RESPONDENT

On March 2, 1956 ANSWER OF RESPONDENT was filed in the words and figures as follows:

(CAPTION OMITTED)

Comes now DUVAL JEWELRY COMPANY, a corporation (hereinafter called the Respondent), by its undersigned counsel, and files this Answer to the Petition to Enforce Subpoena heretofore filed herein and answering, says:

I.

The Respondent admits the material allegations contained in Paragraphs numbered 1, 2, 3, 4, 5, 6, 7 and 8 of said Petition.

II.

The Respondent, answering Paragraph 9 of said Petition, asserts and alleges that Respondent is without knowledge of the allegations contained in said Paragraph 9 except that Respondent admits service of said subpoena or subpoenas upon Respondent as alleged.

III.

The Respondent admits the material allegations of Paragraphs 10 and 11 of said Petition.

IV.

The Respondent denies the allegations of Paragraph 12 of said Petition and further answering said Paragraph 12 Respondent asserts and alleges that the matter of the recocation of said subpoena or subpoenas was not properly before the Petitioner's Hearing Officer but had been presented to Petitioner.

V.

The Respondent, answering Paragraph 13 of said Petition, asserts and alleges that the said Hearing Officer attempted to rule upon Respondent's petition to revoke but that said Hearing Officer did not have the power, jurisdiction or authority to rule upon said petition to revoke nor to issue an order or decision denying said petition to revoke, as will more particularly hereinafter appear.

VI.

The Respondent admits the material allegations of Paragraph 14 of said petition.

VII.

The Respondent, answering Paragraph 15 of said Petition, denies that the information sought by said subpoena or said subpoenas is necessary or relevant to the said representation proceeding as alleged in said Paragraph 15.

VIII.

The Respondent denies the material allegations of Paragraph 16 of said Petition.

IX.

The Respondent, further answering said Petition, and each and every material allegation thereof, asserts and alleges:

1. The said subpoena or subpoenas were not issued by the National Labor Relations Board, or any member thereof, upon application of any party to the said representation proceeding as required by Section 11 of the Labor Management Relations Act, 1947. The said subpoena or subpoenas show upon their face that the request for issuance was made by a person not a party to the said proceeding.

2. The Respondent duly filed a petition to revoke the said subpoena or subpoenas with the National Labor Rela-

tions Board, the Petitioner herein, as required by said Section 11 of said Act, and the said National Labor Relations Board has failed and refused to rule upon said petition to revoke.

3. The said Hearing Officer in said representation proceeding has no power, jurisdiction nor authority to rule upon petitions to revoke subpoenas, this power, jurisdiction and authority being reserved solely and exclusively to the National Labor Relations Board under Section 11 of said Act and is not delegable to any agent or agency of said Board.

4. Said subpoena or subpoenas were not issued according to law, in that there is no authority in the Labor Management Relations Act, 1947, or in any other law applicable to National Labor Relations Board representation hearings, or in any of the Federal Rules of Civil Procedure authorizing the issuance of subpoenas in National Labor Relations Board representation proceeding or enforcement by this Court of subpoenas framed in the alternative, calling for the preparation and production of an unsworn statement by an unidentified person which written statement would not be legal and proper evidence and would not be admissible.

5. On January 3, 1956, service was made of subpoenas duces tecum on Duval Jewelry Company, Duval Jewelry Company of Miami, Inc., Jenkins Jewelry Company and Jenkins and Sons, Inc., and on January 6, 1956, service was made of subpoenas upon Oliver A. Jenkins personally and as President of Duval Jewelry Company, all of said subpoenas requiring the production at the same time, at a

hearing on January 10, 1956, in a city 350 miles away from the principal offices of each of said corporations, of all records or statements showing all purchases made by and all sales made to or throughout the State of Florida in the cities of Coral Gables, Miami, Jacksonville, Tallahassee, DeLand, Ocala, Fort Lauderdale, Daytona Beach, Gainesville, West Palm Beach, Orlando, Tampa and St. Petersburg. To comply with said subpoenas would require the production of all operating books of these several corporations, amounting to scores of ledgers and other books and records, and thousands of individual cards, which would be in the hands of the National Labor Relations Board for an indefinite period of time and to compile statements showing date to be produced would require approximately eight weeks' time, since sales and purchases of the said several corporations involve thousands of transactions over a year's time. The Respondent asserts and alleges that there is only one retail store involved in the National Labor Relations Board proceeding; that said retail store is operated in the City of Miami, Florida, by Duval Jewelry Company of Miami, Inc., a Florida corporation and that there are no employees of any other corporation involved in the said National Labor Relations Board proceeding; that the National Labor Relations Board is attempting a mere "fishing expedition" into the records of all eighteen corporations, wherever located, for the purpose of trying to find some basis of asserting jurisdiction. The Respondent asserts, and the Petitioner well knows, that the Petitioner has no jurisdiction over the single retail store in the City of Miami, involved in the hearing.

6. The said subpoena requires the production of data not material or relevant to any issue in said representation hearing and seeks evidence which does not relate to any

matter under investigation or in question in said hearing, to-wit: The identity of suppliers of all purchases made by Respondent, and the amount of each purchase.

7. The said subpoena is oppressive and unreasonable within the meaning of Rule 45 b of the Federal Rules of Civil Procedure, in that it required the production of all records showing, or statement showing, each and every purchase made by Respondent corporation for an entire year, and the name of each person from whom each purchase was made and the dollar value of each and every purchase, each and every purchase made by Respondent for an entire year for or on behalf of fifteen other corporations operating retail jewelry stores throughout the State of Florida, and the identity of each person from whom such purchases were made and the dollar amount of each sale; each and every sale made by Respondent for an entire year to fifteen other corporations operating retail jewelry stores throughout the State of Florida, and the amount of each sale to each corporation; and the amount and extent of shares owned by Respondent in seventeen other corporations; all of said data required to be produced in a city 350 miles away from the principal office of Respondent, within less than six working days of the time of service of the subpoena.

Wherefore, having fully answered said Petition, Respondent respectfully prays that the Court will

(1) Deny the prayers of said Petition;

(2) Enter an order quashing said subpoena or subpoenas.

Respectfully submitted this 1st day of March, 1956.

HAMILTON & BOWDEN
By /s/ Theo Hamilton
(Theo Hamilton).
Counsel for Respondent

Address of Counsel for Respondents:

Hamilton & Bowden
401 Smith Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 1956 filed the foregoing Answer in this Court and served a copy thereof by registered United States Mail upon the following:

PETITION TO ENFORCE SUBPOENA

On February 21, 1956 PETITION TO ENFORCE SUBPOENA was filed in the words and figures as follows:

In The District Court of The United States
For The Southern District of Florida
Miami Division

National Labor Relations Board
An Administrative Agency of the
Federal Government
(Petitioner)
vs. Civil No. 6761-M

Jenkins and Sons, Inc.
A Corporation
(Respondent)

Now comes the National Labor Relations Board, the Petitioner herein, and for this its petition to enforce a subpoena, states that:

1. Petitioner is an administrative agency of the United States Government created pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151 et seq) hereinafter referred to as the Act.

2. Jenkins and Sons, Inc., the Respondent herein, is a corporation duly organized and existing under the laws of the State of Florida, having its principal office at Jacksonville in said state.

3. The Court has jurisdiction of the subject matter of this proceeding under Section 11(2) of the Act [29 USCA 161(2)] in that the inquiry in aid of which the subpoena hereby sought to be enforced was issued to the Respondent, is and was being carried on within this judicial district.

4. Pursuant to Section 6 of the Act Petitioner has adopted Rules and Regulations (Series 6, effective June 3, 1952), covering the conduct of its operations, which have been duly published in the Federal Register (17 F.R. 4982) as provided for in the Administrative Procedure Act (5 U.S.C. 1002) which Rules and Regulations will be hereinafter referred to as the Rules. Under Section 44 U.S.C. 307 judicial notice may be taken of the Rules.

5. Now and at all times material to the issues herein there is, and was pending before the Petitioner, under Section 9(c) of the Act, a representation proceeding formerly entitled

"In the Matter of

Duval Jewelry Company of Miami, Inc.
(Employer)
and Case No. 10-RC-3333

Local 1625, Retail Clerks International
Association, AFL
(Petitioner)"

which was instituted on November 22, 1955, on which date local 1625, Retail Clerks International Association, AFL,

hereinafter referred to as the Union, filed a representation petition in the Petitioner's Tenth Regional Office, and the title to which said proceeding was thereafter changed to

"In the Matter of

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc.; and/or Jenkins & Sons, Inc.; and/or Jenkins Jewelry Company[1]
(Employers)
and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625, AFL-CIO
(Petitioner)"

[1]An Amended petition was filed herein on 1-4-56 to add as an employer Jenkins & Sons, Inc., Jenkins Jewelry Company and Duval Jewelry Company of Miami, Inc."

when the Union filed a first amended representation petition therein on January 4, 1956. A copy of each of said representation petitions marked Exhibits "1" and "2" respectively are hereto attached and hereby made a part hereof.

6. On November 28, 1955, Petitioner issued and served on the parties, its Notice of Representation Hearing in said proceeding in order to investigate the question as to the representation of employees which was raised by the original representation petition above-described, notifying the parties to said proceeding that a hearing would be held therein on December 5, 1955, a copy of which said Notice

of Representation Hearing, marked Exhibit "3" is likewise hereto attached and hereby made a part hereof.

7. On December 2, 1955, Petitioner rescheduled the hearing in said proceeding to December 20, 1955, by its Order Rescheduling Hearing, which was duly served on said parties and a copy of which, marked Exhibit "4" is likewise hereto attached, and hereby made a part hereof.

8. On January 4, 1956, the Petitioner issued and served on the parties its Amended Notice of Representation Hearing in said proceeding and also served on each of said parties a copy of the first amended representation petition theretofore filed by the union, whereby the parties were notified of the amendments to said original representation petition, and that the hearing would be held on January 10, 1956 a copy of said Amended Notice of Representation Hearing, marked Exhibit "5" is likewise hereto attached and hereby made a part hereof.

9. On December 30, 1955, as provided for in Section 11(1) of the Act and by Section 102.31 (a) of the Rules, and at the written request of counsel for the Petitioner's Regional Director for said Region, the Petitioner issued its subpoena duces tecum No. B-25987 directed to the Respondent herein, requiring its attendance and the production of certain of its records at the hearing in said proceeding which was then scheduled for January 10, 1956, or in lieu of appearing and producing said records at the hearing to submit a written statement giving the information sought to be subpoenaed. Said supoena was duly served upon the Respondent on January 3, 1956. A true copy of said written request and of the document designating counsel for said

Regional Director, marked Exhibits "6" and "7" respectively, are likewise hereto attached and hereby made a part hereof. A true copy of the subpoena duces tecum, together with the United States Marshal's return of service thereof, marked Exhibit "8" is likewise hereto attached and hereby made a part hereof.

10. On January 9, 1956, the Respondent filed its timely petition to revoke the subpoena above-described, and for permission to argue orally and to submit briefs in support of said petition to revoke. A true copy of said petition to revoke, marked Exhibit "9" is likewise hereto attached and hereby made a part hereof.

11. On January 9, 1956, the representation hearing in said proceeding was postponed to February 2, 1956, by a written order duly served on the parties, a true copy of which, marked Exhibit "10" is likewise hereto attached and hereby made a part hereof.

12. On January 9, 1956, the Petitioner's Hearing Officer, before whom said proceeding was then pending, granted, by telegram, respondent's request for oral argument and for permission to file briefs in support of its said petition to revoke. A true copy of said telegram marked Exhibit "11" is likewise hereto attached and hereby made a part hereof.

13. On January 26, 1956 the Hearing Officer denied the Respondent's said petition to revoke by a telegraphic order, a true copy of which, marked Exhibit "12" is likewise hereto attached and hereby made a part hereof.

14. On February 2, 1956, the Respondent appeared at said hearing, by its counsel, and refused to respond to said subpoena or to submit the written statement giving the information sought to be subpoenaed.

15. The information sought to be obtained by said subpoena was necessary and relevant to the said representation proceeding in order to determine the extent to which the Respondent's business operations were, either carried on in interstate commerce, or affected such commerce, and to determine its relationship to the other Employers named in said first amended representation petition, so that Petitioner could determine if it will assert its jurisdiction over the Respondent in said representation proceeding.

16. The refusal of the Respondent to produce the records described in said subpoena, or to submit a written statement in lieu of producing the same, constitutes contumacious conduct within the purview of Section 11(2) of the Act, and by thus impeding the Petitioner in the investigation of said representation proceeding now pending before it, the Respondent has prevented and is preventing the Petitioner from carrying on its duties and functions under the Act.

WHEREFORE, Petitioner, the National Labor Relations Board, respectfully prays:

(a) That an order to show cause issue forthwith directing the Respondent to appear before this Court on a day certain to be fixed in said order, and to show cause, if any there be, why an order should not issue directing it to appear before Petitioner's

Hearing Officer, at such time and place as he may designate, and there produce the records described in said subpoena, and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceeding;

(b) that upon the return of said order to show cause, an order issue requiring the Respondent to appear before said Hearing Officer, at a time and place to be fixed by him, and there produce the records described in said subpoena, and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceeding; and

(c) that petitioner have such other and further relief as may be necessary and proper.

NATIONAL LABOR
RELATIONS BOARD, Petitioner
By Theophil C. Kammholz
General Counsel

/s/ Lloyd R. Fraker
Lloyd R. Fraker,
Chief Law Officer
Tenth Region
National Labor Relations Board
528 Peachtree-Seventh Building
Atlanta 23, Georgia

/s/ Allen Sinsheimer, Jr.
Allen Sinsheimer, Jr., Attorney
Tenth Region
National Labor Relations Board
Croton Hotel
7326 Collins Avenue
Miami Beach, Florida

EXHIBIT "8"

NLRB-31
(8-50)

SUBPENA DUCES TECUM

United States of America
National Labor Relations Board

To Jenkins and Sons, Inc.
34 W. Forsyth Street, Jacksonville, Florida

Request therefor having been duly made by Frank E. Hamilton, Jr., Attorney whose address is 50 Seventh St., (Street)
N. E. Atlanta 23, Georgia.
(City) (State)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE a hearing officer of the National Labor Relations Board, at Plumbing Industry Program Building, 2526 W. Flagler Street in the City of Miami, Florida on the 10th day of January, 1956, at 10:00 o'clock A.M. of that day, to testify in the Matter of Duval Jewelry Company of Mi-

ami, Inc. and Local 1625, Retail Clerks International Association, AFL, Case No. 10-RC-3333

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. The books, records and other documents showing all purchases made by said Jenkins and Sons, Inc. during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation.

2. The books, records and other documents showing all purchases made by said Jenkins and Sons, Inc. during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation, for or on behalf of each of the following named corporations:

Duval Jewelry Company
Duval Jewelry Company of Coral Gables, Inc.
Duval Jewelry Company of Eighth and Main
Duval Jewelry Company of Tallahassee
Duval Jewelry Company of Deland
Duval Jewelry Company of Ocala
Duval Jewelry Company of Fort Lauderdale
Duval Jewelry Company of Daytona Beach
Duval Jewelry Company of Gainesville
Duval Jewelry Company of West Palm Beach, Inc.
Duval Jewelry Company of Miami, Inc.

Duval Jewelry Company of Orlando, Inc.
Duval Jewelry Company of Tampa, Inc.
Duval Jewelry Company of St. Petersburg, Inc.
Duval Jewelry Company at Five Points
Duval Jewelry Company at Colonial Plaza

3. The books, records and other documents showing all sales made by said Jenkins and Sons, Inc. during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation to the following-named corporations:

Duval Jewelry Company etc.
as listed in paragraph 2 above

4. The books, records, and other documents showing amount and extent of shares owned by said Duval Jewelry Company of each of the following-named corporations:

Jenkins Jewelry Company
Duval Jewelry Company etc.
as listed in paragraph 2 above

Or in lieu of the foregoing a statement signed and certified to by a responsible official of said corporation setting forth:

1. The total dollar value of purchases made by said Jenkins and Sons, Inc. during the calendar year January 1, 1955 through December 31, 1955, or during its last fiscal year, the names of all persons from whom purchases were made during said period and the total dollar amount of purchases from each of said persons.

(2) The total dollar value of purchases made by said Jenkins and Sons, Inc. during the calendar year January 1, 1955 through December 31, 1955, or during its last fiscal year for or on behalf of each of the following named corporations:

Jenkins Jewelry Company
Duval Jewelry Company, etc.
as listed in paragraph 2 above

The names of all persons from whom such purchases were made during said period and the total dollar amount of such purchases from each of said persons:

(3) The total dollar value of all sales made by said Jenkins and Sons, Inc. during the calendar year from January 1, 1955, through December 31, 1955, or during the last fiscal year of said corporation to each of the following named corporations:

Jenkins Jewelry Company
Duval Jewelry Company, etc.
as listed in paragraph 2 above

(4) The number of shares owned by said Jenkins and Sons, Inc. of each of the following named corporations, and the total number of shares issued by each of those corporations:

Jenkins Jewelry Company
Duval Jewelry Company, etc.
as listed in paragraph 2 above.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Atlanta, Georgia this 30th day of December, 1955.

B-25987
National Labor
Relations Board
Seal

/s/ Abe Murdock

16-62497-1 GPO

NOTICE TO WITNESS — Witness fees for attendance, subsistence and mileage, under this subpena are payable by the party at whose request the witness is subpenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpena with the voucher when claiming reimbursement.

RETURN OF UNITED STATES MARSHAL SOUTHERN DISTRICT FLORIDA EXECUTED THIS WRIT AT Jacksonville, FLORIDA, ON Jan 3 1956 BY SERVING THE WITHIN-NAMED Jenkins & Sons Inc., A CORPORATION, BY DELIVERING A COPY OF THIS SUMMONS TOGETHER WITH COPY OF COMPLAINT TO Joseph J. Jenkins, AN OFFICER OF THE SAID Jenkins & Sons, Inc., A CORPORATION,

THOMAS H. TRENT,
UNITED STATES MARSHAL

BY: /s/ Jerry D. Dragones

FEE	$ .50
MILEAGE	$ .40
TOTAL	$ .90

EXHIBIT "9"

PETITION TO REVOKE SUBPENA

United States of America
Before The National Labor Relations Board

In the Matter of:

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc.; and/or Jenkins & Sons, Inc. and/or Jenkins Jewelry Company
(Employers)

and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625, AFL-CIO
(Petitioner)

COMES NOW, Jenkins & Sons, Inc., a corporation, by its undersigned counsel, and petitions the National Labor Relations Board to revoke Subpena No. B-25987, addressed to said corporation, upon the following grounds, to-wit:

1. Said subpena is oppressive and unreasonable in that it requires on January 10, 1956, in a city 350 miles away from the offices of said company, the production of records or statements of all purchases made by and sales made to or on behalf of some 16 corporations scattered throughout the State of Florida.

2. Said subpena seeks evidence which is immaterial and irrelevant to any proper issue in the above styled cause.

3. Jenkins & Sons, Inc. is not subject to the jurisdiction of the National Labor Relations Board.

4. It does not appear that the said subpena was duly and properly issued according to law.

5. It does not appear that the said subpena was duly and properly issued according to the Rules and Regulations of the National Labor Relations Board.

6. Jenkins & Sons, Inc. has no interest in these proceedings.

7. Said subpena seeks evidence which does not relate to any matter under investigation or in question in the above styled cause.

8. The National Labor Relations Board has no jurisdiction in this cause.

9. Jenkins & Sons, Inc. is not the employer of any employees involved in this cause.

10. There is no cause pending before the National Labor Relations Board entitled "in the Matter of Duval Jewelry Company of Miami, Inc. and Local 1625, Retail Clerks International Association, AFL, Case No. 10-RC-3333", as stated in said subpena.

Petitioner hereby requests opportunity, upon reasonable notice, to orally argue this petition and any answer thereto and any issues involved herein, and thereafter the opportunity to file a written brief upon said issues.

RESPECTFULLY SUBMITTED this 7th day of January, 1956.

HAMILTON & BOWDEN
By /s/ Theo Hamilton
(Theo Hamilton)
Attorneys for said Petitioner

Address of Counsel:

Hamilton & Bowden
Suite 401, Smith Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of January, 1956, mailed the foregoing Petition to Revoke Subpena to:

National Labor Relations Board
Washington, D. C.

Allen Sinsheimer, Jr., Esq.
Hearing Officer
National Labor Relations Board, Tenth Region
50 Seventh Street, N. E.
Atlanta 23, Georgia

/s/ Theo Hamilton
(Theo Hamilton)

RECITATION — Civil 6761-M:

The Exhibits being numbered from 1 to 7 inclusive, and 10 to 12, inclusive, which are attached to the petition to enforce subpoena in Civil 6761-M are one and the same as attached to the petition in 6759-M-Civil and found on page 13 of this record.

ORDER TO SHOW CAUSE

On February 21, 1956 ORDER TO SHOW CAUSE was filed in the words and figures as follows:

(CAPTION OMITTED)

Petitioner having filed its petition herein for an order requiring Jenkins and Sons, Inc., the Respondent, to obey a certain subpoena duces tecum, and the Court having duly considered the same, it is hereby,

ORDERED, that the Respondent appear in this Court at Miami, Florida, on the 2nd day of March, 1956, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, and show cause, if any there be, why the prayer of said petition should not be granted, and it is hereby further,

ORDERED that this order and the petition on which it is based be served on the Respondent, on or before February 25, 1956 and that the Respondent shall file and serve its answer to the petition not later than March 1st, 1956.

Service of this order, of the petition herein, and of the Respondent's answer, in any manner provided by the Rules of Civil Procedure for the District Courts of the United States, or by registered or certified mail, shall constitute good and sufficient service.

Issued at Miami, Florida, this 21st day of February, 1956.

EMETT C. CHOATE
Judge of the District Court of the United States for the Southern District of Florida

---

ANSWER OF RESPONDENT

On March 2, 1956 ANSWER OF RESPONDENT was filed in the words and figures as follows:

(CAPTION OMITTED)

Comes now JENKINS AND SONS, INC., a corporation (hereinafter called the Respondent), by its undersigned counsel, and files this Answer to the Petition to Enforce Subpoena heretofore filed herein and answering, says:

I

The Respondent admits the material allegations contained in Paragraphs numbered 1, 2, 3, 4, 5, 6, 7 and 8 of said Petition.

II

The Respondent answering Paragraph 9 of said Petition, asserts and alleges that Respondent is without knowledge of the allegations contained in said Paragraph 9 except that Respondent admits service of said subpoena or subpoenas upon Respondent as alleged.

III

The Respondent admits the material allegations of Paragraphs 10 and 11 of said Petition.

IV

The Respondent denies the allegations of Paragraph 12 of said Petition and further answering said Paragraph 12 Respondent asserts and alleges that the matter of the revocation of said subpoena or subpoenas was not properly before the Petitioner's Hearing Officer but had been presented to Petitioner.

V

The Respondent, answering Paragraph 13 of said Petition, asserts and alleges that the said Hearing Officer attempted to rule upon Respondent's petition to revoke but that said Hearing Officer did not have the power, jurisdiction or authority to rule upon said petition to revoke nor to issue an order or decision denying said petition to revoke, as will more particularly hereinafter appear.

VI

The Respondent admits the material allegations of Paragraph 14 of said Petition.

VII

The Respondent, answering Paragraph 15 of said Petition, denies that the information sought by said subpoena or said subpoenas is necessary or relevant to the said representation proceeding as alleged in said Paragraph 15.

VIII

The Respondent denies the material allegations of Paragraph 16 of said Petition.

IX

The Respondent, further answering said Petition, and each and every material allegation thereof, asserts and alleges:

1. The said subpoena or subpoenas were not issued by the National Labor Relations Board, or any member thereof, upon application of any party to the said representation proceeding as required by Section 11 of the Labor Management Relations Act, 1947. The said subpoena or supoenas show upon their face that the request for issuance was made by a person not a party to the said proceeding.

2. The Respondent duly filed a petition to revoke the said subpoena or subpoenas with the National Labor Rela-

tions Board, the Petitioner herein, as required by said Section 11 of said Act, and the said National Labor Relations Board has failed and refused to rule upon said Petition to revoke.

3. The said Hearing Officer in said representation proceeding has no power, jurisdiction nor authority to rule upon petitions to revoke subpo nas, this power, jurisdiction and authority being reserved solely and exclusively to the National Labor Relations Board under Section 11 of said Act and is not delegable to any agent or agency of said Board.

4. Said subpoena or subpoenas were not issued according to law, in that there is no authority in the Labor Management Relations Act, 1947, or in any other law applicable to National Labor Relations Board representation hearings, or in any of the Federal Rules of Civil Procedure authorizing the issuance of subpoenas in National Labor Relations Board representation proceeding or enforcement by this Court of subpoenas framed in the alternative, calling for the preparation and production of an unsworn statement by an unidentified person which written statement would not be legal and proper evidence and would not be admissible.

5. On January 3, 1956, service was made of subpoenas duces tecum on Duval Jewelry Company, Duval Jewelry Company of Miami, Inc., Jenkins Jewelry Company and Jenkins and Sons, Inc., and on January 6, 1056, service was made of subpoenas upon Oliver A. Jenkins personally and as President of Duval Jewelry Company, all of said subpoenas requiring the production at the same time, at a hearing on January 10, 1956 in a city 350 miles away from the

principal offices of each of said corporations, of all records or statements showing all purchases made by and all sales made to or throughout the State of Florida in the cities of Coral Gables, Miami, Jacksonville, Tallahassee, DeLand, Ocala, Fort Lauderdale, Daytona Beach, Gainesville, West Palm Beach, Orlando, Tampa and St. Petersburg. To comply with said subpoenas would require the production of all operating books of these several corporations, amounting to scores of ledgers and other books and records, and thousands of individual cards, which would be in the hands of the National Labor Relations Board for an indefinite period of time and to compile statements showing data to be produced would require approximately eight weeks' time, since sales and purchases of the said several corporations involve thousands of transactions over a year's time. The Respondent asserts and alleges that there is only one retail store involved in the National Labor Relations Board proceeding, that said retail store is operated in the City of Miami, Florida, by Duval Jewelry Company of Miami, Inc., a Florida corporation and that there are no employees of any other corporation involved in the said National Labor Relations Board proceeding; that the National Labor Relations Board is attempting a mere "fishing expedition" into the records of all eighteen corporations, wherever located, for the purpose of trying to find some basis of asserting jurisdiction. The Respondent asserts, and the Petitioner well knows, that the Petitioner has no jurisdiction over the single retail store in the City of Miami, involved in the hearing.

6. The said subpoena requires the production of data not material or relevant to any issue in said representation hearing and seeks evidence which does not relate to any

matter under investigation or in question in said hearing, to-wit: The identity of suppliers of all purchases made by Respondent, and the amount of each purchase.

7. The said subpoena is oppressive and unreasonable within the meaning of Rule 45 b of the Federal Rules of Civil Procedure, in that it required the production of all records, showing or statements showing each and every purchase made by Respondent corporation for an entire year, and the name of each person from whom each purchase was made and the dollar value of each and every purchase, each and every purchase made by Respondent for an entire year for or on behalf of each of sixteen different corporations operating retail jewelry stores throughout the State of Florida, the dollar value of each and every purchase and the name of each person from whom such purchases were made on behalf of each of said corporations and the total dollar value of all sales made to each of seventeen other corporations for an entire year; and the amount extent of shares of stock owned by Respondent in seventeen other corporations; all of said data required to be produced in a city 350 miles away from the principal office of Respondent, within less than six working days of the time of service of the subpoena.

Wherefore, having fully answered said Petition, Respondent respectfully prays that the Court will

(1) Deny the prayers of said Petition;

(2) Enter an order quashing said subpoena or subpoenas.

Respectfully submitted this 1st day of March, 1956.

HAMILTON & BOWDEN
By /s/ Theo Hamilton
(Theo Hamilton)
Counsel for Respondent

Address of Counsel for Respondents:

Hamilton & Bowden
401 Smith Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 1956, filed the foregoing Answer in this Court and served a copy thereof by registered United States Mail upon the following:

National Labor Relations Board
Washington, D. C.

Lloyd R. Fraker, Esq.
Chief Law Officer
Tenth Region
National Labor Relations Board
528 Peachtree-Seventh Building
Atlanta, Georgia

Allen Sinsheimer, Jr., Esq.
Attorney
Tenth Region

National Labor Relations Board
Croton Hotel
7326 Collins Avenue
Miami Beach, Florida

/s/ Theo Hamilton
(Theo Hamilton)
of Counsel for Respondent

PETITION TO ENFORCE SUBPOENA

On February 21, 1956 PETITION TO ENFORCE SUBPOENA was filed in the words and figures as follows:

In The District Court of The United States
For The Southern District of Florida
Miami Division

National Labor Relations Board,
An Administrative Agency of the
Federal Government
(Petitioner)
vs. Civil No. 6762-M

Jenkins Jewelry Company,
A Corporation
(Respondent)

Now comes the National Labor Relations Board, the Petitioner herein, and for this its petition to enforce a subpoena, states that:

1. Petitioner is an administrative agency of the United States Government created pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151 et seq.) hereinafter referred to as the Act.

2. Jenkins Jewelry Company, the Respondent herein, is a corporation duly organized and existing under the laws of the State of Florida, having its principal office at Jacksonville in said state.

3. The Court has jurisdiction of the subject matter of this proceeding under Section 11(2) of the Act [29 USCA 161 (2)] in that the inquiry in aid of which the subpoena hereby sought to be enforced was issued to the Respondent, is and was being carried on within this judicial district.

4. Pursuant to Section 6 of the Act Petitioner has adopted Rules and Regulations (Series 6, effective June 3, 1952), covering the conduct of its operations, which have been duly published in the Federal Register (17 F.R. 4982) as provided for in the Administrative Procedure Act (5 U.S.C. 1002), which Rules and Regulations will be hereinafter referred to as the Rules. Under Section 44 U.S.C. 307 judicial notice may be taken of the Rules.

5. Now and at all times material to the issues herein there is, and was pending before the Petitioner, under Section 9(c) of the Act, a representation proceeding formerly entitled

"In the Matter of

Duval Jewelry Company of Miami, Inc.
(Employer)
and Case No. 10-RC-3333

Local 1625, Retail Clerks International Association, AFL
(Petitioner)

which was instituted on November 22, 1955, on which date Local 1625, Retail Clerks International Association, AFL, hereinafter referred to as the Union, filed a representation petition in the Petitioner's Tenth Regional Office, and the title to which said proceeding was thereafter changed to

"In the Matter of

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc.; and/or Jenkins & Sons, Inc.; and/or Jenkins Jewelry Company[1]
(Employers)
and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625, AFL-CIO
(Petitioner)

[1]An amended petition was filed herein on 1-4-56 to add as an employer Jenkins & Sons, Inc., Jenkins Jewelry Company and Duval Jewelry Company of Miami, Inc."

when the Union filed a first amended representation petition therein on January 4, 1956. A copy of each of said

representation petitions marked Exhibits "1" and "2" respectively are hereto attached and hereby made a part hereof.

6. On November 28, 1955, Petitioner issued and served on the parties, its Notice of Representation Hearing in said proceeding in order to investigate the question as to the representation of employees which was raised by the original represenation petition above-described, notifying the parties to said proceeding that a hearing would be held therein on December 5, 1955, a copy of which said Notice of Representation Hearing, marked Exhibit "3", is likewise hereto attached and hereby made a part hereof.

7. On December 2, 1955, Petitioner rescheduled the hearing in said proceeding to December 20, 1955, by its Order Rescheduling Hearing, which was duly served on said parties and a copy of which, marked Exhibit "4" is likewise hereto attached and hereby made a part hereof.

8. On January 4, 1956 the Petitioner issued and served on the parties its Amended Notice of Representation Hearing in said proceeding and also served on each of said parties a copy of the first amended representation petition theretofore filed by the union, whereby the parties were notified of the amendments to said original representation petition, and that the hearing would be held on January 10, 1956, a copy of said Amended Notice of Representation Hearing, marked Exhibit "5" is likewise hereto attached and hereby made a part hereof.

9. On December 30, 1955, as provided for in Section 11(1) of the Act and by Section 102.31 (a) of the Rules, and

at the written requests of counsel for the Petitioner's Regional Director for said Region, the Petitioner issued its subpoena duces tecum No. B-25988 directed to the Respondent herein, requiring its attendance and the production of certain of its records at the hearing in said proceeding which was then scheduled for January 10, 1956, or in lieu of appearing and producing said records at the hearing to submit a written statement giving the information sought to be subpoenaed. Said subpoena was duly served upon the Respondent on January 3, 1956. A true copy of said written requests and of the document designating counsel for said Regional Director, marked Exhibits "6", "6a" and "7" respectively, are likewise hereto attached and hereby made a part hereof. A true copy of said subpoena duces tecum, together with the United States Marshal's return of service thereof, marked Exhibit "8", is likewise hereto attached and hereby made a part hereof.

10. On January 9, 1956, the Respondent filed its timely petition to revoke the subpoena above-described and for permission to argue orally and to submit briefs in support of said petition to revoke. A true copy of said petition to revoke, marked Exhibit "9" is likewise hereto attached and hereby made a part hereof.

11. On January 9, 1956, the representation hearing in said proceeding was postponed to February 2, 1956, by a written order duly served on the parties, a true copy of which, marked Exhibit "10" is likewise hereto attached and hereby made a part hereof.

12. On January 9, 1956, the Petitioner's Hearing Officer before whom said proceeding was then pending, granted,

by telegram, respondent's request for oral argument and for permission to file briefs in support of its said petition to revoke. A true copy of said telegram, marked Exhibit "11" is likewise hereto attached and hereby made a part hereof.

12. On January 26, 1956, the Hearing Officer denied the Respondent's said petition to revoke by a telegraphic order, a true copy of which, marked Exhibit "12" is likewise hereto attached and hereby made a part hereof.

14. On February 2, 1956 the Respondent appeared at said hearing, by its counsel, and refused to respond to said subpoena or to submit the written statement giving the information sought to be subpoenaed.

15. The information sought to be obtained by said subpoena was necessary and relevant to the said representation proceeding in order to determine the extent to which the Respondent's business operations were, either carried on in interstate commerce, or affected such commerce, and to determine its relationship to the other Employees named in said first amended representation petition, so that Petitioner could determine if it will assert its jurisdiction over the Respondent in said representation proceeding.

16. The refusal of the Respondent to produce the records described in said subpoena, or to submit a written statement in lieu of producing the same, constitutes contumacious conduct within the purview of Section 11(2) of the Act, and by thus impeding the Petitioner in the investigation of said representation proceeding now pending before it, the Respondent has prevented and is preventing the

Petitioner from carrying on its duties and functions under the Act.

WHEREFORE, Petitioner, the National Labor Relations Board, respectfully prays:

(a) That an order to show cause issue forthwith directing the Respondent to appear before this Court on a day certain to be fixed in said order, and to show cause, if any there be, why an order should not issue directing it to appear before Petitioner's Hearing Officer, at such time and place as he may designate, and there produce the records described in said subpoena, and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceeding;

(b) That upon the return of said order to show cause, an order issue requiring the Respondent to appear before said Hearing Officer, at a time and place to be fixed by him, and there produce the records described in said subpoena, and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceeding; and

(c) That Petitioner have such other and further relief as may be necessary and proper.

NATIONAL LABOR
RELATIONS BOARD, Petitioner
By Theophil C. Kammholz
General Counsel

/s/ Lloyd R. Fraker
Lloyd R. Fraker,
Chief, Law Officer
Tenth Region
National Labor Relations Board
528 Peachtree-Seventh Building
Atlanta 23, Georgia

/s/ Allen Sinsheimer, Jr.
Allen Sinsheimer, Jr., Attorney
Tenth Region
National Labor Relations Board
Croton Hotel
7326 Collins Avenue
Miami Beach, Florida

EXHIBIT "6a"

REQUEST FOR SUBPENA DUCES TECUM

John C. Getreu, Regional Director December 30, 1955
Frank E. Hamilton, Jr., Acting Chief Law Officer
Duval Jewelry Company of Miami, Inc.
Case No. 10-RC-3333

It is requested that authorization be granted to issue subpena duces tecum directed to Jenkins Jewelry Company, 34 W. Forsyth Street, Jacksonville, Florida, calling for the production of the same record information and at the same time and place as requested in the subpena directed to Jenkins and Sons, Inc., except the names Jenkins Jewelry Company

and Jenkins and Sons, Inc. will be transposed in the two subpenas.

/s/ F. E. H., Jr.
F. E. H., Jr.

Approved /s/ John C. Getreu
Regional Director

Date 12-30-55

NLRB-31
(8-50)

EXHIBIT "8"

SUBPENA DUCES TECUM

United States of America
National Labor Relations Board

To: Jenkins Jewelry Company
34 W. Forsyth Street, Jacksonville, Florida

Request therefor having been duly made by: Frank E. Hamilton, Jr., Attorney whose address is: 50 Seventh St., (Street)
N. E. Atlanta 23, Georgia
(City) (State)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE: a hearing officer of the National Labor Relations Board, at Plumbing Industry Program Building, 2526 W. Flagler Street in the City of Miami, Florida on the 10th day of January, 1956, at 10:00 o'clock A.M. of that day, to testify in the Matter of Duval Jewelry Company of Miami,

Inc. and Local 1625, Retail Clerks International Association, AFL, Case No. 10-Rc-3333

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. The books, records and other documents showing all purchases made by said Jenkins Jewelry Company during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation.

2. The books, records and other documents showing all purchases made by said Jenkins Jewelry Company during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation, for or on behalf of each of the following named corporations:

Duval Jewelry Company
Duval Jewelry Company of Coral Gables, Inc.
Duval Jewelry Company of Eighth and Main
Duval Jewelry Company of Tallahassee
Duval Jewelry Company of Deland
Duval Jewelry Company of Ocala
Duval Jewelry Company of Fort Lauderdale
Duval Jewelry Company of Daytona Beach
Duval Jewelry Company of Gainesville
Duval Jewelry Company of West Palm Beach, Inc.
Duval Jewelry Company of Miami, Inc.
Duval Jewelry Company of Orlando, Inc.

Duval Jewelry Company of Tampa, Inc.
Duval Jewelry Company of St. Petersburg, Inc.
Duval Jewelry Company at Five Points
Duval Jewelry Company at Colonial Plaza

3. The books, records and other documents showing all sales made by said Jenkins Jewelry Company during the calendar year from January 1, 1955 through December 31, 1955, or during the last fiscal year of said corporation to the following-named corporations:

Duval Jewelry Company etc.
as listed in paragraph 2 above

4. The books, records, and other documents showing amount and extent of shares owned by said Jenkins Jewelry Company of each of the following
/s/ FEHJr

named corporations:

Jenkins and Sons, Inc.
Duval Jewelry Company etc.
as listed in paragraph 2 above

Or in lieu of the foregoing a statement signed and certified to by a responsible official of said corporation setting forth:

(1) The total dollar value of purchases made by said Jenkins Jewelry Company during the calendar year January 1, 1955 through December 31, 1955, or during its last fiscal year, the names of all persons from whom purchases were made during said period and

the total dollar amount of purchases from each of said persons.

(2) The total dollar value of purchases made by said Jenkins Jewelry Company during the calendar year January 1, 1955 through December 31, 1955, or during its last fiscal year for or on behalf of each of the following named corporations:

Jenkins and Sons, Inc.
Duval Jewelry Company etc.
as listed in paragraph 2 above

The names of all persons from whom such purchases were made during said period and the total dollar amount of such purchases from each of said persons:

(3) The total dollar value of all sales made by said Jenkins Jewelry Company during the calendar year from January 1, 1955, through December 31, 1955, or during the last fiscal year of said corporation to each of the following named corporations:

Jenkins and Sons, Inc.
Duval Jewelry Company etc.
as listed in paragraph 2 above

(4) The number of shares owned by said Jenkins and Sons, Inc. of each of the following named corporations, and the total number of shares issued by each of these corporations:

Jenkins and Sons, Inc.
Duval Jewelry Company etc.
as listed in paragraph 2 above

B-25988 In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Atlanta, Georgia this 30th day of December, 1955.

/s/ Abe Murdock

NOTICE TO WITNESS — Witness fees for attendance, subsistence, and mileage, under this subpena are payable by the party at whose request the witness is subpenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpena with the voucher when claiming reimbursement.

RETURN OF UNITED STATES MARSHAL SOUTHERN DISTRICT FLORIDA EXECUTED THIS WRIT AT JACKSONVILLE, FLORIDA, ON JAN 3 1956, BY SERVING THE WITHIN NAMED JENKINS JEWELRY CO., A CORPORATION, by DELIVERING A COPY OF THIS SUMMONS TOGETHER WITH COPY OF COMPLAINT TO L. K. MAXWELL, AN OFFICE OF THE SAID JENKINS JEWELRY CO., A CORPORATION.

THOMAS H. TRENT,
UNITED STATES MARSHAL
BY: /s/ Jerry D. Dragones
Deputy.

FEE	$ .50
MILEAGE	.10
TOTAL	.60

EXHIBIT "9"

PETITION TO REVOKE SUBPENA

United States of America
Before The National Labor Relations Board

In the Matter of:

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc; and/or Jenkins & Sons, Inc.; and/or Jenkins Jewelry Company
(Employers)

and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625 — AFL-CIO
(Petitioner)

COMES NOW, Jenkins Jewelry Company, a corporation, by its undersigned counsel, and petitions the National Labor Relations Board to Revoke Subpena No. B-25988 addressed to said corporation, upon the following grounds, to-wit:

1. Said subpena is oppressive and unreasonable in that it requires the production of records of all purchases made, or a statement of all purchases, and the names of all persons from whom purchases were made, by said company, for an entire year to be produced in a city 350 miles away from the offices of said company on January 10, 1956.

2. Said subpena is oppressive and unreasonable in that it requires on January 10, 1956, in a city 350 miles away from

the offices of said company, the production of records or statements of all purchases for or on behalf of and all sales made to sixteen different corporations scattered throughout the State of Florida.

3. Said subpena seeks evidence which is immaterial and irrelevant to any proper issue in the above-styled cause.

4. Jenkins Jewelry Company is not subject to the jurisdiction of the National Labor Relations Board.

5. It does not appear that the said subpena was duly and properly issued according to law.

6. It does not appear that the said subpoena was duly and properly issued according to the Rules and Regulations of the National Labor Relations Board.

7. Jenkins Jewelry Company has no interest in these proceedings.

8. Said subpena seeks evidence which does not relate to any matter under investigation or in question in the above-styled cause.

9. The National Labor Relations Board has no jurisdiction in this cause.

10. Jenkins Jewelry Company is not the employer of any employees involved in this cause.

11. There is no cause pending before the National Labor Relations Board entitled "in the Matter of Duval Jewelry

Company of Miami, Inc. and Local 1625, Retail Clerks International Association, AFL, Case No. 10-RC-3333", as stated in said subpena.

Petitioner hereby requests opportunity, upon reasonable notice, to orally argue this petition and any answer thereto and any issues involved herein, and thereafter the opportunity to file a written brief upon said issues.

RESPECTFULLY SUBMITTED this 7th day of January, 1956.

HAMILTON & BOWDEN

By /s/ Theo Hamilton
(Theo Hamilton)
Attorneys for said petitioner

Address of Counsel:

Hamilton & Bowden
Suite 401, Smith Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of January, 1956, mailed the foregoing Petition to Revoke Subpena to:

National Labor Relations Board
Washington, D. C.

Allen Sinsheimer, Jr., Esq.
Hearing Officer
National Labor Relations Board, Tenth Region
50 Seventh Street, N.E.
Atlanta 23, Georgia

/s/ Theo Hamilton
(Theo Hamilton)

RECITATION CIVIL 6762-M

The Exhibits being numbered from 1 to 6 inclusive, 7, 10 to 12 inclusive, which are attached to the petition to enforce subpoena in Civil 6762-M are one and the same as attached to the petition in 6759-M-Civil and found on page 13 of this record.

ORDER TO SHOW CAUSE

On February 21, 1956 ORDER TO SHOW CAUSE was filed in the words and figures as follows:

(CAPTION OMITTED)

Petitioner having filed its petition herein for an order requiring Jenkins Jewelry Company, the Respondent, to obey a certain subpoena duces tecum, and the Court having duly considered the same, it is hereby,

ORDERED that the Respondent appear in this Court at Miami, Florida, on the 2nd day of March, 1956, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, and show cause, if any there be, why the prayer of said petition should not be granted, and it is hereby further,

ORDERED, that this order and the petition on which it is based be served on the Respondent, on or before February 25, 1956, and that the Respondent shall file and serve its answer to the petition not later than March 1st, 1956. Service of this order, of the petition herein, and of the Respondent's answer, in any manner provided by the Rules of Civil Procedure for the District Courts of the United

States, or by registered or certified mail, shall constitute good and sufficient service.

Issued at Miami, Florida, this 21st day of February, 1956.

EMETT C. CHOATE
Judge of the District Court of the United States for the Southern District of Florida

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ANSWER OF RESPONDENT

On March 2, 1956 ANSWER OF RESPONDENT was filed in the words and figures as follows:

(CAPTION OMITTED).

Comes now JENKINS JEWELRY COMPANY, a corporation (hereinafter called the Respondent), by its undersigned counsel, and files this Answer to the Petition to Enforce Subpoena heretofore filed herein and answering, says:

I

The Respondent admits the material allegations contained in Paragraphs numbered 1, 2, 3, 4, 5, 6, 7 and 8 of said Petition.

II

The Respondent, answering Paragraph 9 of said Petition, asserts and alleges that Respondent is without knowledge of the allegations contained in said Paragraph 9 except that Respondent admits service of said subpoena or subpoenas upon Respondent as alleged.

III

The Respondent admits the material allegations of Paragraphs 10 and 11 of said Petition.

IV

The Respondent denies the allegations of Paragraph 12 of said petition and further answering said Paragraph 12 Respondent asserts and alleges that the matter of the revocation of said subpoena or subpoenas was not properly before the Petitioner's Hearing Officer but had been presented to Petitioner.

V

The Respondent, answering Paragraph 13 of said Petition, asserts and alleges that the said Hearing Officer attempted to rule upon Respondent's petition to revoke but that said Hearing Officer did not have the power, jurisdiction or authority to rule upon said petition to revoke nor to issue an order of decision denying said petition to revoke, as will more particularly hereinafter appear.

VI

The Respondent admits the material allegations of Paragraph 14 of said petition.

VII

The Respondent, answering Paragraph 15 of said Petition, denies that the information sought by said subpoena or said subpoenas is necessary or relevant to the said representation proceeding as alleged in said Paragraph 15.

VIII

The Respondent denies the material allegations of Paragraph 16 of said Petition.

IX

The Respondent, further answering said Petition, and each and every material allegation thereof, asserts and alleges:

1. The said subpoena or subpoenas were not issued by the National Labor Relations Board, or any member thereof, upon application of any party to the said representation proceeding as required by Section 11 of the Labor Management Relations Act, 1947. The said subpoena or subpoenas show upon their face that the request for issuance was made by a person not a party to the said proceeding.

2. The Respondent duly filed a petition to revoke the said subpoena or subpoenas with the National Labor Relations

Board the Petitioner herein, as required by said Section 11 of said Act, and the said National Labor Relations Board has failed and refused to rule upon said petition to revoke.

3. The said Hearing Officer in said representation proceeding has no power, jurisdiction nor authority to rule upon petitions to revoke subpoenas, this power, jurisdiction and authority being reserved solely and exclusively to the National Labor Relations Board under Section 11 of said Act and is not delegable to any agent or agency of said board.

4. Said subpoena or subpoenas were not issued according to law, in that there is no authority in the Labor Management Relations Act, 1947, or in any other law applicable to National Labor Relations Board representation hearings, or in any of the Federal Rules of Civil Procedure authorizing the issuance of subpoenas in National Labor Relations Board representation proceeding or enforcement by this Court of subpoenas framed in the alternative, calling for the preparation and production of an unsworn statement by an unidentified person which written statement would not be legal and proper evidence and would not be admissible.

5. On January 3, 1956, service was made of subpoenas duces tecum on Duval Jewelry Company, Duval Jewelry Company of Miami, Inc., Jenkins Jewelry Company and Jenkins and Sons, Inc., and on January 6, 1956, service was made of subpoenas upon Oliver A. Jenkins personally and as President of Duval Jewelry Company, all of said subpoenas requiring the production, at the same time, at a hearing on January 10, 1956, in a city 350 miles away from the principal offices of each of said corporations, of all records or statements showing all purchases made by and all

sales made to or on behalf of some eighteen corporations operating sixteen retail jewelry stores throughout the State of Florida in the cities of Coral Gables, Miami, Jacksonville, Tallahassee, DeLand, Ocala, Fort Lauderdale, Daytona Beach, Gainesville, West Palm Beach, Orlando, Tampa and St. Petersburg. To comply with said subpoenas would require the production of all operating books of these several corporations, amounting to scores of ledgers and other books and records, and thousands of individual cards, which would be in the hands of the National Labor Relations Board for an indefinite period of time and to compile statements showing data to be produced would require approximately eight weeks' time, since sales and purchases of the said several corporations involve thousands of transactions over a year's time. The Respondent asserts and alleges that there is only one retail store involved in the National Labor Relations Board proceeding; that said retail store is operated in the City of Miami, Florida, by Duval Jewelry Company of Miami, Inc., a Florida corporation and that there are no employees of any other corporation involved in the said National Labor Relations Board proceeding; that the National Labor Relations Board is attempting a mere "fishing expedition" into the records of all eighteen corporations, wherever located, for the purpose of trying to find some basis of asserting jurisdiction. The Respondent asserts, and the Petitioner well knows, that the Petitioner has no jurisdiction over the single retail store in the City of Miami, involved in the hearing.

6. The said subpoena requires the production of data not material or relevant to any issue in said representation hearing and seeks evidence which does not relate to any matter under investigation or in question in said hearing,

to-wit: The identity of suppliers of all purchases made by Respondent, and the amount of each purchase.

7. The said subpoena is oppressive and unreasonable within the meaning of Rule 45 b of the Federal Rules of Civil Procedure in that it required the production of all records showing, or statements showing each and every purchase made by Respondent for an entire year and the name of every person from whom each purchase was made and the amount of each and every purchase; and each and every purchase for an entire year made for or on behalf of each of sixteen other corporations operating retail jewelry stores throughout the State of Florida, and the name of every person from whom each purchase was made and the dollar amount of each such purchase and each and every sale for an entire year made to sixteen other corporations and the dollar amount of each such sale; all of said data required to be produced in a city 350 miles away from the principal office of Respondent, within less than six working days of the time of service of the subpoena.

Wherefore, having fully answered said Petition, Respondent respectfully prays that the court will

(1) Deny the prayers of said Petition;

(2) Enter an order quashing said subpoena or subpoenas.

Respectfully submitted this 1st day of March, 1956.

HAMILTON & BOWDEN
By /s/ Theo Hamilton
(Theo Hamilton)
Counsel for Respondent

Address of Counsel for Respondents:

Hamilton & Bowden
401 Smith Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 1956 filed the foregoing Answer in this Court and served a copy thereof by registered United States Mail upon the following

National Labor Relations Board
Washington, D. C.

Lloyd R. Fraker, Esq.
Chief Law Officer
Tenth Region
National Labor Relations Board
528 Peachtree-Seventh Building
Atlanta, Georgia

Allen Sinsheimer, Jr., Esq.
Attorney
Tenth Region

National Labor Relations Board
Croton Hotel
7326 Collins Avenue
Miami Beach, Florida

/s/ Theo Hamilton
(Theo. Hamilton)
of Counsel for Respondent

PETITION TO ENFORCE SUBPOENAS

On February 21, 1956 PETITION TO ENFORCE SUBPOENA was filed in the words and figures as follows:

In The District Court of the United States
For The Southern District of Florida
Miami Division

National Labor Relations Board,
An Administrative Agency of the
Federal Government
(Petitioner)
vs. Civil No. 6763-M

Oliver A. Jenkins
(Respondent)

Now comes the National Labor Relations Board, the Petitioner herein, and for this its petition to enforce subpoenas, states that:

1. Petitioner is an administrative agency of the United States Government created pursuant to the National Labor Relations Act, as amended, (61 Stat. 136, 29 USC., Supp. V, Sec. 151, et seq.), hereinafter referred to as the Act.

2. Petitioner is informed and believes that Oliver A. Jenkins, the Respondent herein, is, and at all times material to the issues herein, was, the president of the following named corporations: Jenkins and Sons, Inc., Duval Jewelry Company, Duval Jewelry Company of Coral Gables, Inc., Duval Jewelry Company at Eight and Main, Duval Jewelry Company of Tallahassee, Duval Jewelry Company of Deland, Duval Jewelry Company of Ocala, Duval Jewelry Company of Fort Lauderdale, Duval Jewelry Company of Daytona Beach, Duval Jewelry Company of Gainesville, Duval Jewelry Company of West Palm Beach, Inc., Duval Jewelry Company of Miami, Inc., Duval Jewelry Company of Orlando, Inc., Duval Jewelry Company of Tampa, Inc., Duval Jewelry Company of St. Petersburg, Inc., Duval Jewelry Company at Five Points, Duval Jewelry Company at Colonial Plaza, and Jenkins Jewelry Company, that said corporations are engaged in the operation of a chain or group of retail jewelry stores in the State of Florida, and that as the president thereof the Respondent has full knowledge of such operations and of the policy of said corporations as to their employees.

3. The Court has jurisdiction of the subject matter of this proceeding under Section 11(2) of the Act [29 USCA 161 (2)] in that the inquiry in aid of which the subpoenas hereby sought to be enforced were issued to the Respondent, is and was being carried on within this judicial district.

4. Pursuant to Section 6 of the Act Petitioner has adopted Rules and Regulations (Series 6, effective June 3, 1952), covering the conduct of its operations, which have been duly published in the Federal Register (17 F.R. 4982) as provided for in the Administrative Procedure Act (5 U.S.C. 1002) which Rules and Regulations will be hereinafter referred to as the Rules. Under Section 44 U.S.C. 307 judicial notice may be taken of the Rules.

5. Now and at all times material to the issues herein there is, and was pending before the Petitioner, under Section 9(c) of the Act, a representation proceeding formerly entitled

"In the Matter of

Duval Jewelry Company of Miami, Inc.
(Employer)
and Case No. 10-RC-3333

Local 1625, Retail Clerks International
Association, AFL
(Petitioner)"

which was instituted on November 22, 1955, on which date Local 1625, Retail Clerks International Association, AFL, hereinafter referred to as the Union, filed a representation petition in the Petitioner's Tenth Regional Office, and the title on which said proceeding was thereafter changed to.

"In the Matter of

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc.; and/or Jenkins & Sons, Inc.; and/or Jenkins Jewelry Company[1]

(Employers)

and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625, AFL-CIO

(Petitioner)

[1]An amended petition was filed herein on 1-4-56 to add as an employer Jenkins & Sons, Inc., Jenkins Jewelry Company and Duval Jewelry Company of Miami, Inc."

when the Union filed a first amended representation petition therein on January 4, 1956. A copy of each of said representation petitioners marked Exhibits "1" and "2" respectively are hereto attached and hereby made a part hereof.

6. On November 28, 1955, Petitioner issued and served on the parties, its Notice of Representation Hearing in said proceeding in order to investigate the question as to the representation of employees which was raised by the original representation petition above-described, notifying the parties to said proceeding that a hearing would be held therein on December 5, 1955, a copy of which said Notice of Representation Hearing, marked Exhibit "3", is likewise hereto attached and hereby made a part hereof.

7. On December 2, 1955, Petitioner rescheduled the hearing in said proceeding to December 20, 1955, by its Order Rescheduling Hearing, which was duly served on said parties and a copy of which, marked Exhibit "4" is likewise hereto attached, and hereby made a part hereof.

8. On January 4, 1956, the Petitioner issued and served on the parties its Amended Notice of Representation Hearing in said proceeding and also served on each of said parties a copy of the first amended representation petition theretofore filed by the union, whereby the parties were notified of the amendments to said original representation petition, and that the hearing would be held on January 10, 1956, a copy of said Amended Notice of Representation Hearing, marked Exhibit "5" is likewise hereto attached and hereby made a part hereof.

9. On December 30, 1955, as provided for in Section 11(1) of the Act and by Section 102.31(a) of the Rules, and at the written requests of counsel for the Petitioner's Regional Director for said Region, the Petitioner issued its subpoena duces tecum No. B-25989 directed to the Respondent herein, requiring his attendance at the hearing in said representation proceeding which was then scheduled for January 10, 1956, and the production of certain records showing his stock ownership and other evidence of beneficial interest in said corporations, or in lieu of appearing and producing said records at the hearing, to submit a written statement giving the information sought to be subpoenaed, and on the same day and in like manner, issued its subpoena ad testificandum No. A-75787, also directed to the Respondent requiring his attendance and testimony at said hearing. Both of which said subpoenas were duly served on

the Respondent on January 6, 1956. True copies of said written requests, and of said subpoenas together with the United States Marshal's return of service of said subpoenas, marked Exhibit "6", Exhibit "6b", Exhibit "8" and Exhibit "8A" respectively, are likewise hereto attached and hereby made a part hereof.

10. On January 13, 1956, the Respondent filed his timely separate petitions to revoke each of said subpoenas and for permission to argue orally and to submit briefs in support of said petitions to revoke. True copies of said petitions to revoke marked Exhibit "9" and "9a" respectively are likewise hereto attached and hereby made a part hereof.

11. On January 9, 1956, the representation hearing in said proceeding was postponed to February 2, 1956, by a written order duly served on the parties, a true copy of which, marked Exhibit "10" is likewise hereto attached and hereby made a part hereof.

12. On January 9, 1956, the Petitioner's Hearing Officer, before whom said proceeding was then pending, granted, by telegram, respondent's request for oral argument and for permission to file briefs in support of its said petition to revoke. A true copy of said telegram, marked Exhibit "11" is likewise hereto attached and hereby made a part hereof.

13. On January 26, 1956 the Hearing Officer denied the Respondents said petitions to revoke by a telegraphic order, a true copy of which, marked Exhibit "12" is likewise, attached and hereby made a part hereof.

14. On February 2, 1956, the Respondent appeared at said hearing, by his counsel, and refused to respond to said subpoenas or to submit a written statement giving the information sought to be obtained by said subpoena duces tecum No. B-25989.

15. The information sought to be obtained by said subpoena duces tecum No. B-25989 and the testimony of the Respondent sought to be obtained by said subpoena ad testificandum No. A-75787 were necessary and relevant to said representation proceeding in order, to determine the extent to which the business operations of the corporations listed in paragraph 2 above (including the employers involved in said representation proceeding) were, either carried on in interstate commerce, or affected such commerce, and to determine the interrelationship between said corporations and the extent to which the labor relations policies of the respective employers named in said representation proceedings, are integrated and administered so that Petitioner could determine if it will assert its jurisdiction over said employers in said representation proceeding.

16. The refusal of the Respondent to produce the records described in said subpoena duces tecum No. B-25989 or to submit a written statement in lieu of producing said records, and to appear and testify at said hearing in response to said subpoena ad testificandum No. A-75787 constitutes contumacious conduct within the purview of Section 11(2) of the Act, and by thus impeding Petitioner in the investigation of said representation proceeding now pending before it, the Respondent has prevented and is preventing the Petitioner from carrying on its duties and functions under the Act.

WHEREFORE, Petitioner, the National Labor Relations Board, respectfully prays:

(a) That an order to show cause issue forthwith directing the Respondent to appear before this Court on a day certain to be fixed in said order, and to show cause, if any there be, why an order should not issue directing him to appear before Petitioner's Hearing Officer, at such time and place as he may designate, and there produce the records described in said subpoena duces tecum, and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceedings, as required by said subpoena ad testificandum;

(b) that upon the return of said order to show cause, an order issue requiring the Respondent to appear before said Hearing Officer, at a time and place to be fixed by him, and there produce the records described in said subpoena duces tecum and give testimony and answer any and all questions relevant and material to the matter under investigation and in question in said representation proceedings, as required by said subpoena ad testificandum; and

(c) that Petitioner have such other and further relief as may be necessary and proper.

NATIONAL LABOR
RELATIONS BOARD, Petitioner
By Theophil C. Kammholz
General Counsel

/s/ Lloyd R. Fraker
Lloyd R. Fraker.
Chief Law Officer
Tenth Region
National Labor Relations Board
528 Peachtree-Seventh Building
Atlanta 23, Georgia

/s/ Allen Sinsheimer, Jr.
Allen Sinsheimer, Jr., Attorney
Tenth Region
National Labor Relations Board
Croton Hotel
7326 Collins Avenue
Miami Beach, Florida

EXHIBIT "6b"

REQUEST FOR SUBPENA AD TESTIFICANDUM

John C. Getreu, Regional Director December 30, 1955
Frank E. Hamilton, Jr., Acting Chief Law Officer
Duval Jewelry Company of Miami, Inc.
Case No. 10-RC-3333

It is requested that authorization be granted to issue subpena ad testificandum to the individual named below directing him to appear and testify before a Hearing Officer of the National Labor Relations Board at the Plumbing Industry Program Building, 2526 W. Flagler Street, Miami, Florida, at 10:00 A.M. on January 10, 1956; in the matter of Duval

Jewelry Company of Miami, Inc. and Local 1625, Retail Clerks International Association, AFL:

Oliver A. Jenkins, President
Duval Jewelry Company
34 W. Forsyth Street
Jacksonville, Florida

F. E. H., Jr.

Approved /s/ John C. Getreu
Regional Director

December 30, 1955

Approved /s/ Frank E. Hamilton, Jr.
Acting Chief Law Officer

December 30, 1955

NLRB-31
(8-50)

EXHIBIT "8"

SUBPENA DUCES TECUM

United States of America
National Labor Relations Board

To Mr. Oliver A. Jenkins
34 W. Forsyth Street, Jacksonville, Florida

Request therefor having been duly made by Frank E. Hamilton, Jr., Attorney whose address is 50 Seventh St., (Street)
N. E. Atlanta 23, Georgia
(City) (State)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE a hearing officer of the National Labor Relations Board at Plumbing Industry Program Building; 2526 W. Flagler Street in the City of Miami, Florida on the 10th day of January, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Duval Jewelry Company of Miami, Inc. and Local 1625, Retail Clerks International Association, AFL, Case No. 10-RC-3333

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. All shares of stock and other evidence of beneficial

interest which the aforesaid Oliver A. Jenkins owns in each of the following-named corporations:

Jenkins and Sons, Inc.
Jenkins Jewelry Company
Duval Jewelry Company
Duval Jewelry Company of Coral Gables, Inc.
Duval Jewelry Company at Eighth and Main
Duval Jewelry Company of Tallahassee
Duval Jewelry Company of Deland
Duval Jewelry Company of Ocala
Duval Jewelry Company of Fort Lauderdale
Duval Jewelry Company of Daytona Beach
Duval Jewelry Company of Gainesville
Duval Jewelry Company of West Palm Beach, Inc.
Duval Jewelry Company of Miami, Inc.
Duval Jewelry Company of Orlando, Inc.
Duval Jewelry Company of Tampa, Inc.
Duval Jewelry Company of St. Petersburg, Inc.
Duval Jewelry Company at Five Points
Duval Jewelry Company at Colonial Plaza

Or in lieu of producing the foregoing to produce a statement signed and certified to by said Oliver A. Jenkins setting forth (1) the number of shares of stock owned by said Oliver A. Jenkins in each of the following-named corporations:

(1) Jenkins and Sons, Inc., etc
as listed in paragraph 1 aboye

(2) All other beneficial interest which said Oliver A.

Jenkins has in each of the corporations listed aforesaid above.

B-25989 In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Atlanta, Georgia this 30th day of December, 1955.

(SEAL) /s/ Abe Murdock

NOTICE TO WITNESS. — Witness fees for attendance, subsistence, and mileage, under this subpena are payable by the party at whose request the witness is subpenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpena with the voucher when claiming reimbursement.

RETURN OF UNITED STATES MARSHAL SOUTHERN DISTRICT OF FLORIDA EXECUTED THIS WRIT AT Jacksonville, FLORIDA, ON Jan. 6, 1956, BY DELIVERING A TRUE COPY HEREOF TO Oliver A. Jenkins.

THOMAS H. TRENT,
UNITED STATES MARSHAL

BY: /s/ Jerry D. Dragones

FEE	$ .50
MILEAGE	$ .10
TOTAL	$ .60

NLRB-32
(6-50)

EXHIBIT "8a"

SUBPENA

United States of America
National Labor Relations Board

To Mr. Oliver A. Jenkins, President
Duval Jewelry Company
34 W. Forsyth Street, Jacksonville, Florida

Request therefor having been duly made by Frank E. Hamilton, Jr., Attorney whose address is 50 Seventh St., (Street)
N. E. Atlanta 23, Georgia
(City) (State)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR before a hearing officer of the National Labor Relations Board, at Plumbing Industry Program Building, 2526 W. Flagler Street in the City of Miami, Florida on the 10th day of January, 1956, at 10:00 o'clock A.m. of that day, to testify in the Matter of Duval Jewelry Company of Miami, Inc, and Local 1625, Retail Clerks International Association, AFL, Case No. 10-RC-3333.

A-75787
National Labor Relations Board Seal

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations

Board, has hereunto set his hand at Atlanta 23, Georgia this 30th d. v of December, 1955.

/s/ Abe Murdock

16-4457-1 GPO

NOTICE TO WITNESS. — Witness fees for attendance, subsistence, and mileage, under this subpena are payable by the party at whose request the witness is subpenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpena with the voucher when claiming reimbursement.

RETURN OF UNITED STATES MARSHALL SOUTHERN DISTRICT OF FLORIDA, EXECUTED THIS WRIT AT Jacksonville, FLORIDA, ON Jan 6 1956, BY DELIVERING A TRUE COPY HEREOF TO Oliver A. Jenkins.

THOMAS H. TRENT,
UNITED STATES MARSHAL

BY: /s/ Jerry D. Dragones
Deputy.

FEE	$ .50
MILEAGE	$ .10
TOTAL	$ .60

EXHIBIT "9"

PETITION TO REVOKE SUBPENA

United States of America
Before the National Labor Relations Board

In the Matter of:

Duval Jewelry Company, and/or Duval Jewelry Company of Miami, Inc.; and/or Jenkins & Sons, Inc. and/or Jenkins Jewelry Company
(Employers)
and Case No. 10-RC-3333

Retail Clerks International Association, Local No. 1625, AFL-CIO

COMES NOW, Oliver A. Jenkins, by his undersigned counsel, and petitions the National Labor Relations Board to revoke Subpena No. B-25989, upon the following grounds, to-wit:

1. The National Labor Relations Board has no jurisdiction in this cause.

2. Said Subpena seeks evidence which is immaterial and irrelevant to any issue in this cause.

3. It does not appear that said Subpena was duly and properly issued according to law.

4. It does not appear that the said Subpena was duly and properly issued according to the Rules and Regulations of the National Labor Relations Board.

5. Said Subpena seeks evidence which does not relate to any matter under investigation or in question in this cause.

6. There is no cause pending before the National Labor Relations Board entitled "in the Matter of Duval Jewelry Company of Miami, Inc. and Local 1625, Retail Clerks International Association, AFL, Case No. 10-RC-3333", as stated in said Subpena.

7. Said Subpena is illegal and void in that it is framed in the alternative.

8. Said Subpena is illegal and void in that it calls for a statement which is inadmissible in evidence.

9. Said Subpena is so vague, indefinite and uncertain as to its requirements that petitioner cannot answer them.

Petitioner hereby requests opportunity, upon reasonable notice, to orally argue this petition and any answer thereto and any issues involved herein, and thereafter the opportunity to file a written brief upon said issues.

RESPECTFULLY SUBMITTED this 11th day of January, 1956.

HAMILTON & BOWDEN

By /s/ Theo Hamilton
(Theo Hamilton)
Attorneys for said Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of January, 1956, mailed the foregoing Petition to Revoke Subpena to:

National Labor Relations Board
Washington, D. C.

Allen Sinsheimer, Jr., Esq.
Hearing Officer
National Labor Relations Board, Tenth Region
50 Seventh Street, N.E.
Atlanta 23, Georgia

/s/ Theo Hamilton
(Theo Hamilton)

RECITATION CIVIL 6763-M

The Exhibits being numbered from 1 to 6 inclusive, 7, 10 to 12 inclusive, which are attached to the petition to enforce subpoena in Civil 6763-M are one and the same as attached to the petition in 6759-M and found on page 13 of this record.

ORDER TO SHOW CAUSE

On February 21, 1956 ORDER TO SHOW CAUSE was filed in the words and figures as follows:

(CAPTION OMITTED)

Petitioner having filed its petition herein for an order requiring Oliver A. Jenkins, the Respondent, to obey a certain subpoena duces tecum and to obey a certain subpoena ad testificandum, and the court having duly considered the same, it is hereby,

ORDERED, that the Respondent appear in this Court at Miami, Florida, on the 2nd day of March, 1956, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, and show cause, if any there be, why the prayer of said petition should not be granted, and it is hereby further,

ORDERED, that this order and the petition on which it is based be served on the Respondent, on or before February 25, 1956, and that the Respondent shall file and serve his answer to the petition not later than March 1st, 1956. Service of this order, of the petition herein, and of the Respondent's answer, in any manner provided by the Rules of Civil Procedure for the District Courts of the United States, or by registered or certified mail, shall constitute good and sufficient service.

Issued at Miami, Florida, this 21st day of February, 1956.

EMETT C. CHOATE
Judge of the District Court of the United States for the Southern District of Florida

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ANSWER OF RESPONDENT

On March 2, 1956 ANSWER OF RESPONDENT was filed in the words and figures as follows:

(CAPTION OMITTED)

Comes now OLIVER A. JENKINS (hereinafter called the Respondent), by his undersigned counsel, and files this Answer to the Petition to Enforce Subpoena heretofore filed herein and answering, says:

I

The Respondent admits the material allegations contained in Paragraphs numbered 1, 2, 3, 4, 5, 6, 7 and 8 of said Petition.

II

The Respondent, answering Paragraph 9 of said Petition, asserts and alleges that Respondent is without knowledge of the allegations contained in said Paragraph 9 except that

Respondent admits service of said subpoena or subpoenas upon Respondent as alleged.

III

The Respondent admits the material allegations of Paragraphs 10 and 11 of said Petition.

IV

The Respondent denies the allegations of Paragraph 12 of said Petition and further answering said Paragraph 12 Respondent asserts and alleges that the matter of the revocation of said subpoena or subpoenas was not properly before the Petitioner's Hearing Officer but had been presented to Petitioner.

V

The Respondent, answering Paragraph 13 of said Petition, asserts and alleges that the said Hearing Officer attempted to rule upon Respondent's petition to revoke but that said Hearing Officer did not have the power, jurisdiction or authority to rule upon said petition to revoke nor to issue an order or decision denying said petition to revoke, as will more particularly hereinafter appear.

VI

The Respondent admits the material allegations of Paragraph 14 of said Petition.

VII

The Respondent, answering Paragraph 15 of said Petition, denies that the information sought by said subpoena or said subpoenas is necessary or relevant to the said representation proceeding as alleged in said Paragraph 15.

VIII

The Respondent denies the material allegations of Paragraph 16 of said Petition.

IX

The Respondent, further answering said Petition, and each and every material allegation thereof, asserts and alleges:

1. The said subpoena or subpoenas were not issued by the National Labor Relations Board, or any member thereof, upon application of any party to the said representation proceeding as required by Section 11 of the Labor Management Relations Act, 1947. The said subpoena or subpoenas show upon their face that the request for issuance was made by a person not a party to the said proceeding.

2. The Respondent duly filed a petition to revoke the said subpoena or subpoenas with the National Labor Relations Board, the Petitioner herein, as required by said Section 11 of said Act, and the said National Labor Relations Board has failed and refused to rule upon said petition to revoke.

3. The said Hearing Officer in said representation proceeding has no power, jurisdiction nor authority to rule upon petitions to revoke subpoenas, this power, jurisdiction and authority being reserved solely and exclusively to the National Labor Relations Board under Section 11 of said Act and is not delegable to any agent or agency of said Board.

4. Said subpoena or subpoenas were not issued according to law, in that there is no authority in the Labor Management Relations Act, 1047, or in any other law applicable to National Labor Relations Board representation hearings, or in any of the Federal Rules of Civil Procedure authorizing the issuance of subpoenas in National Labor Relations Board representation proceeding or enforcement by this Court of subpoenas framed in the alternative, calling for the preparation and production of an unsworn statement by an unidentified person which written statement would not be legal and proper evidence and would not be admissible.

5. On January 3, 1956, service was made of subpoenas duces tecum on Duval Jewelry Company, Duval Jewelry Company of Miami, Inc., Jenkins Jewelry Company and Jenkins and Sons, Inc., and on January 6, 1956, service was made of subpoenas upon Oliver A. Jenkins personally and as President of Duval Jewelry Company, all of said subpoenas requiring the production, at the same time, at a hearing on January 10, 1956, in a city 350 miles away from the principal offices of each of said corporations, of all records of statements showing all purchases made by and all sales made to or on behalf of some eighteen corporations operating sixteen retail jewelry stores throughout the State of Florida in the cities of Coral Gables, Miami, Jacksonville,

Tallahassee, DeLand, Ocala, Fort Lauderdale, Daytona Beach, Gainesville, West Palm Beach, Orlando, Tampa and St. Petersburg. To comply with said subpoenas would require the production of books and records, and thousands of individual cards, which would be in the hands of the National Labor Relations Board for an indefinite period of time and to compile statements showing data to be produced would require approximately eight weeks' time, since sales and purchases of the said several corporations involve thousands of transactions over a year's time. The Respondent asserts and alleges that there is only one retail store involved in the National Labor Relations Board proceeding; that said retail store is operated in the City of Miami, Florida, by Duval Jewelry Company of Miami, Inc., a Florida corporation and that there are no employees of any other corporation involved in the said National Labor Relations Board proceeding; that the National Labor Relations Board is attempting a mere "fishing expedition" into the records of all eighteen corporations, wherever located, for the purpose of trying to find some basis of asserting jurisdiction. The Respondent asserts, and the Petitioner well knows, that the Petitioner has no jurisdiction over the single retail store in the City of Miami, involved in the hearing.

6. Subpoena No. B-25989 requires the production of data not material or relevant to any issue in said representation hearing and seeks evidence which does not relate to any matter under investigation or in question in said hearing, to-wit: The number of shares of stock or other evidence of beneficial interest held by Respondent in eighteen different corporations, seventeen of which have no employees involved in the said representation hearing and have no

interest whatever in said hearing or in any issues which might be involved therein.

7. The said subpoenas are oppressive and unreasonable within the meaning of Rule 45 b of the Federal Rules of Civil Procedure in that said subpoenas attempt to require Respondent to appear and testify before Respondent has had a reasonable opportunity to compile data from records of the various corporations named in Paragraph 2 of this Petition to ascertain whether or not the corporations named as Employers in the said representation proceedings are or are not subject to the jurisdiction of the National Labor Relations Board and this Respondent asserts and alleges that it would be prejudicial to him, and would hamper him in preparation for said hearing, as president of said corporations, to require him to appear and testify in said hearing until he has had an opportunity to compile the data necessary to show that the said corporations named as Employers in said representation proceedings are or are not subject to the jurisdiction of the National Labor Relations Board. The said subpoenas required the appearance of Respondent at a hearing in a city 350 miles away from Respondent's principal offices and principal place of business within less than three working days from time of service of said subpoenas. Respondent asserts and alleges that the preparation of necessary data and checking of the records necessary to show facts referred to above would require approximately eight weeks.

Wherefore, having fully answered said Petition, Respondent respectfully prays that the Court will

(1) Deny the prayers of said Petition;

(2) Enter an order quashing said subpoena or subpoenas.

Respectfully submitted this 1st day of March, 1956.

HAMILTON & BOWDEN
By /s/ Theo Hamilton
(Theo Hamilton)
Counsel for Respondent

Address of Counsel for Respondents:

Hamilton & Bowden
401 Smith Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 1956, filed the foregoing Answer in this Court and served a copy thereof by registered United States Mail upon the following:

National Labor Relations Board
Washington, D. C.

Lloyd R. Fraker, Esq.
Chief Law Officer
Tenth Region
National Labor Relations Board
528 Peachtree-Seventh Building
Atlanta, Georgia

Allen Sinsheimer, Jr., Esq.
Attorney
Tenth Region
National Labor Relations Board
Croton Hotel
7326 Collins Avenue
Miami Beach, Florida

/s/ Theo Hamilton
(Theo Hamilton)
of Counsel for Respondent

ORDER QUASHING SUBPOENAS

On April 3, 1956 ORDER QUASHING SUBPOENAS was filed in Case Nos. 6759-M-Civil; 6760-M-Civil; 6761-M-Civil; 6762-M-Civil and 6763-M-Civil, and appear in the words and figures as follows:

(CAPTION OMITTED)

This matter comes before me to enforce compliance with subpoenas ad testificandum and duces tecum issued preparatory to a National Labor Relations Board representation hearing. The subpoenas in question were directed to the above-named Respondents in these causes, who are also co-respondents in the National Labor Relations Board Case No. 10-RC-3333. The question of the validity and propriety of the subpoenas came on to be heard before the Court on the 2nd day of March, 1956, pursuant to 29 U.S.C.A. § 161, and the Court, having heard argument of counsel and hav-

ing examined the very able briefs submitted subsequent to the hearing by both sides, is of the opinion that the subpoenas sought to be enforced in these causes should be quashed for the following reasons.

From the face of the subpoenas duces tecum (Exhibit "8" attached to the Petition in each of these causes) it is clear that they are unreasonable, burdensome, and oppressive. They were issued on the 30th day of December, 1955, and directed to persons in Jacksonville, Florida. They required the production of voluminous books and records essential in the operation of the Respondent's businesses, on the 10th day of January, 1956, at a representation hearing in Miami, Florida, located some 350 miles from Jacksonville, Florida. The extreme shortness of time within which the Respondents had to gather and produce their many records becomes quite apparent when it is appreciated that not only is the gathering of the records time-consuming, but in addition a great deal of time would be required by the Respondents to copy certain essential parts of the subpoenaed records in order that their respective businesses would not suffer because of the absence of the books and records. Subpoenas duces tecum requiring the production of books and records essential in the operation of a business should provide ample time for the business to prepare for the absence of those books and records. Patently no such time was provided herein. For that reason the subpoenas duces tecum should be quashed.

A more serious question arises over the validity of the issue of the subpoenas. Section 161 of Title 29, *U.S.C.A.* provides ". . . The Board, or any member thereof, shall upon application of any party to such proceedings (repre-

sentation hearings or unfair labor practice hearings), forthwith issue to such *party* subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application . . ." (Emphasis supplied).

Nowhere does Congress place any new meaning to the term "party" as used in the said Section 161 but the National Labor Relations Board in its Rules and Regulations (29 C.F.R. § 102.8) attempts to originate a new concept in Anglo-American jurisprudence by attempting to make its Regional Directors a "party" in all proceedings in their respective regions. Congress nowhere has given the Board the power to enlarge by rule-making the clear-meaning terms employed in the statute in question, nor does the statute contemplate any "Board" actions except to enforce the Board's findings. Nowhere in the Common Law is there any basis for a construction of the word "party" to include persons directly associated with the "disinterested" tribunal before which tribunal both sides (here union and management) in an adversary proceeding are submitting, or are about to submit, their causes. The term "party" does have a universally accepted meaning and the attempt of the Board (the tribunal) to enlarge that meaning by rule to include its Regional Directors is in my opinion a nullity.

In the cases at bar the subpoenas in question (both ad testificandum and duces tecum) were issued pursuant to the request of one Frank E. Hamilton, Attorney for John C. Getreu, as Regional Director of the National Labor Relations Board. Inasmuch as the subpoenas in question were not issued upon application of a "party" to the representation proceedings before the National Labor Relations Board

hearing officer, those subpoenas were not, in my opinion, issued according to law and should be quashed. It is, therefore

ORDERED AND ADJUDGED that the subpoenas sought to be enforced herein (Civil cases No. 6759-M; 6760-M; 6761-M; 6762-M; and 6763-M) be and the same are hereby quashed.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of March, 1956.

EMETT C. CHOATE
UNITED STATES DISTRICT JUDGE

NOTICE OF APPEAL

On May 14, 1956 NOTICE OF APPEAL by National Labor Relations Board was filed in the words and figures as follows:

United States District Court
For The Southern District of Florida
Miami Division

National Labor Relations Board,
Appellant;
v.
Civil No. 6759-M

Duval Jewelry Company of Miami, Inc.,
A Corporation,
Appellee.

National Labor Relations Board,
Appellant,
v. Civil No. 6760-M

Duval Jewelry Company, A Corporation,
Appellee.

National Labor Relations Board,
Appellant,
v. Civil No. 6761-M

Jenkins and Sons, Inc., A Corporation,
Appellee.

National Labor Relations Board,
Appellant,
v. Civil No. 6762-M

Jenkins Jewelry Company, A Corporation,
Appellee.

National Labor Relations Board,
Appellant,
v. Civil No. 6763-M

Oliver A. Jenkins,
Appellee.

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Notice is hereby given that the National Labor Relations Board, appellant in the above cases, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the "Order Quashing Subpoenas," entered in the above-captioned proceedings on March 30, 1956.

/s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel

NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C.
this day of May, 1956.

CLERK'S CERTIFICATE

United States of America,
Southern District of Florida, ss:

I, JULIAN A. BLAKE, Clerk of the United States District Court, in and for the Southern District of Florida, and as the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered from 1 to 157, inclusive, contain a true, full and complete copy of all such portions of the record, proceedings, and evidence in causes styled:

National Labor Relations Board, an Administrative Agency of the Federal Government
- vs -
Duval Jewelry Company of Miami, Inc., a corporation, Case No. 6759-M - Civil;

National Labor Relations Board, an Administrative Agency of the Federal Government
- vs -
Duval Jewelry Company, a corporation
Case No. 6760 - M - Civil;

National Labor Relations Board, an Administrative Agency of the Federal Government
- vs -
Jenkins and Sons, Inc., a corporation
Case No. 6761 - M - Civil;

National Labor Relations Board, an Administrative Agency of the Federal Government
- vs -
Jenkins Jewelry Company, a corporation
Case No. 6762 - M - Civil;

and

National Labor Relations Board, an Administrative Agency of the Federal Government
- vs -
Oliver A. Jenkins
Case No. 6763 - M - Civil.

as appear upon the records and files of my office that have been designated by written directions of the appellant to be included in this record on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Court at Miami, Florida, on this the 11th day of September, A. D. 1956.

JULIAN A. BLAKE
As Clerk of the United States District Court in and for the Southern District of Florida.

By EARLE F. SPRIGG
— Chief Deputy Clerk —

(SEAL)

Minute entry of argument and submission

January 7, 1957

[Omitted in printing.]

In the United States Court of Appeals for the Fifth Circuit

No. 16180

NATIONAL LABOR RELATIONS BOARD, APPELLANT

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of Florida

Opinion

(April 2, 1957)

Before RIVES, TUTTLE and BROWN, *Circuit Judges.*

RIVES, Circuit Judge: The National Labor Relations Board applied to the district court for orders to enforce certain subpoenas duces tecum and ad testificandum which the Board claimed to have issued pursuant to Section 11 (1) of

the National Labor Relations Act.[1] The jurisdiction of the district court was based on Section 11 (2) of the

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[1] "§ 161. *Investigatory powers of Board.*

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

"Documentary evidence summoning witnesses and taking testimony

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any

Act.[2] The district court "quashed" the subpoenas upon the grounds, (1) that they were unreasonable, burdensome and oppressive and (2) that they were not issued upon application of a "party" to the proceedings before the Board. It failed to pass upon a third ground to the effect that the
163 applications for enforcement were premature because the Board had not itself, under Section 11 (1) [footnote (1), *supra*], considered and ruled on petitions to revoke each of said subpoenas. If the third ground is good, then there has been no such final administrative action as is prerequisite to judicial review or enforcement,[3] and, as a matter of law, there has been no contumacy or refusal to obey a subpoena." Section 11 (2) [Footnote (2), *supra*]. At the threshold, therefore, we give consideration to the third ground.

Each and all of the respondents, appellees, had filed with the National Labor Relations Board petitions to revoke the subpoenas together with requests for permission to file briefs and present oral arguments in support of their petitions. The Board, calling attention to Section 102.58 (c) of its
164 Rules, 29 C. F. R., § 102.58 (c),[4] refused to entertain

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Territory or possession thereof, at any designated place of hearing." Title 29, U. S. C. A.

[2] "Court aid in compelling production of evidence and attendance of witnesses:

"(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." Title 29, U. S. C. A. § 161 (2)

[3] See 42 Am. Jur., Public Administrative Law, Sec. 194.

[4] "(c) Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however*, That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to

the petitions. The hearing officer undertook to deny the petitions to revoke. The respondents did not request "special permission of the Board" to appeal.[5]

One of the subpoenas directed to appellee Oliver Jenkins was a subpoena ad testificandum, as to which there appears no provision in the Act for a petition to revoke [see Section 11 (1), Footnote (1), *supra*], and hence the application for its enforcement was not premature on that ground.

All of the other subpoenas were subpoenas duces tecum and the petitions to revoke, while not couched in the language of the statute, sufficiently raised the point of relevancy, that is, that "the evidence whose production is required does not relate to any matter under investigation or any matter in question in such proceedings." Section 11 (1), Footnote (1), *supra*. As to the subpoenas duces tecum, then, the primary question is whether the Act empowers the Board to delegate to hearing officers the power to pass upon such petitions to revoke.

We think that that question is answered in the negative by the carefully worded provisions of Section 11 (1)
165 of the Act, Footnote (1), *supra*. There the gradations in authority are explicitly delimited. "The Board, or its duly authorized agents or agencies" are given access to and the right to copy evidence. Upon the application of any party, "the Board, or any member thereof" is required "forthwith" to *issue* subpoenas. At that stage there is no discretion. However, any person served with a subpoena duces tecum "may petition *the Board* to revoke, and *the Board* shall revoke such subpoena if in *its* opinion" etc. [Emphasis supplied.]

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the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them." 29 C. F. R. § 102.58 (c).

[5] "Unless expressly authorized by these Rules and Regulations, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record." Section 102.57 (c) of the Board's Rules, 29 C. F. R. 102.57 (c).

It may be, as stated in *N. L. R. B.* v. *Pesante*, S. D. Calif., 119 F. Supp. 444, 450, 451, 452, that the legislative history of the Act further supports such construction. We think, however, that the language itself of Section 11 (1) of the Act is plain, and that a different construction is not authorized by any other part of the Act nor by the Act as a whole.

The Seventh Circuit's remarks about petitions to revoke in *N. L. R. B.* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160, were necessarily dicta as it does not appear that any such petition was filed in that case.

An administrative remedy under which any person served with a subpoena duces tecum may seek protection from the Board itself to make certain that the evidence is described with sufficient particularity and is relevant to the inquiry should not, we believe, prove unduly burdensome to the Board. If it does the remedy lies with Congress, not with the courts.

In most cases, methods less burdensome to the respond-
166 ents than subpoenas duces tecum are available to the Board, such as the right of "the Board, or its duly authorized agents or agencies" to have access to and to copy any evidence, supplemented if need be by the use of subpoenas ad testificandum, required to be issued upon the application of any party.

The reasoning of the Supreme Court in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363, is highly persuasive that the Board has no authority to delegate its power to revoke a subpoena:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these

are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency." 315 U. S. at pp. 363–364.

167 Nothing in the later case of *Fleming* v. *Mohawk Co.*, 331 U. S. 111, seems to us to lead toward a different construction of the Act now under consideration.[6]

Under the Act, we think that the Board's jurisdiction to pass on petitions to revoke subpoenas duces tecum is original, not appellate, that the denial of the petitions by the hearing officer was a mere nullity, and that the respondents were not required to request "special permission of the Board" to appeal. The petitions to revoke were addressed to and filed with the Board itself, and until the Board has passed upon the petitions one way or the other, there is no "contumacy or refusal to obey a subpoena" [see 11 (2) of the Act, Footnote (2), *supra*], and the matter of the enforcement of the subpoenas is not ripe for consideration of the court. We hold, therefore, that the district court should have declined to rule upon the enforcement of the subpoenas duces tecum.[7]

The subpoena ad testificandum directed to appellee Oliver Jenkins is not claimed to be oppressive or burdensome.[8]

168 Was it properly quashed because not issued upon the application of a "party" to the proceedings before the Board? The subpoena was sought in a representation proceeding brought under Section 9 (c) of the Act, 29 U. S. C. A. 159 (c) (1).[9] The labor organization and the employer are usually

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[6] See the discussion of the Mohawk Case in N. L. R. B. v. Pesante, S. D. Calif., 119 F. Supp. 444, 454, 455.

[7] It should be noted that we are not passing upon the authority as to subpoenas duces tecum of a trial examiner or hearing officer in an unfair labor practice case. Representation proceedings, as distinguished from unfair labor practice cases, are somewhat removed from the purview of the Administrative Procedure Act, 5 U. S. C. A. 1001, et seq. Section 1004 specifically excepts agency hearings involving "the certifications of employee representatives" from those provisions applicable to cases of "adjudication," including, we think, the provisions of Section 1005 (c) dealing with agency subpoenas. Compare N. L. R. B. v. Anchor Rome Mills, 5th Cir., 197 F. 2d 447.

[8] In any event, courts can usually remove the oppression or burden without quashing the entire subpoena. N. L. R. B. v. Anchor Rome Mills, 5th Cir., 197 F. 2d 447, 450; Jackson Packing Co. v. N. L. R. B., 5th Cir., 204 F. 2d 842, 844.

[9] "(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of

adversely interested in such a proceeding. The proceeding is, however, an "investigation." [10] "The employer is, in theory at least, not much concerned, since the employees are to choose their representative unhindered." *N. L. R. B.* v. *Whittier Mills Co.*, 5th Cir., 111 F. 2d 474, 478. The Board is charged with the responsibility of conducting the representation investigation, and the express terms of the statute authorize the Board to use subpoenas in aid of its investigations.[11] Section 102.8 of the Board's Rules and Regulations, 29 C. F. R., Sec. 102.8, 1956 Supp., defines "party" as including "the regional director in whose region the proceeding is pending," [12] though we do not consider that important to a decision of the present question. The language of the statute authorizing the use of subpoenas in investigations, while requiring their issuance upon the application of any "party," may appear to be conflicting, but the purpose is clear.

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employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U. S. C. A. § 159 (c) (1).

[10] Inland Empire District Council v. Millis, 325 U. S. 697, 706; N. L. R. B. v. National Mineral Co., 7th Cir., 134 F. 2d 424, 426.

[11] Section 11 of the Act, 29 U. S. C. A. 161, Footnote 1, supra. N. L. R. B. v. Anchor Rome Mills, 5th Cir., 197 F. 2d 447, 449.

[12] "§ 102.8 *Party.* The term 'party' as used in this part shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8 (a) (1) or 8 (a) (2) of the act; but nothing in this part shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only." 29 C. F. R., 1956 Supp.

Contrary to the district court in *N. L. R. B.* v. *Pesante, supra,* 119 F. Supp. at p. 457, we can see no objection to the Board member furnishing the subpoenas under his signature to the Regional Director to be used by the Director in such investigations as required. We think that the district court erred in declining to enforce the subpoena ad testificandum directed to Oliver Jenkins, and in not declining to rule upon the enforcement of the subpoenas duces tecum. One-sixth of the cost of appeal is taxed against the appellees, and the other five-sixths against the appellant. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

170 In the United States Court of Appeals for the Fifth Circuit

No. 16180

NATIONAL LABOR RELATIONS BOARD

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL.

Judgment

April 2, 1957

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellant, National Labor Relations Board, be condemned to pay five-sixths of the costs of this cause in this Court; and that the appellees, Duval Jewelry Company of Miami, Inc., and others, be condemned, in solido, to pay one-sixth of the costs of this cause in this Court, for all of which execution may be issued out of the said District Court.

* * * * *

171 In the United States Court of Appeals for the Fifth Circuit

[File endorsement omitted.]
[Title omitted.]

Motion of the National Labor Relations Board for modification of opinion

Filed April 13, 1957

On April 2, 1957 this Court handed down its opinion in the subject case, sustaining the District Court's denial of enforcement of the subpenas *duces tecum* and overruling its refusal to enforce the subpena *ad testificandum*. The opinion concludes with the statement that: "One-sixth of the cost of appeal is taxed against the appellees, and the other five-sixths against the appellant." The Board respectfully requests that this sentence be deleted from the opinion, for the following reasons:

1. 28 U. S. C., Section 2412 (a) provides: "The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." Accordingly, this Court has held that: "The United States is not liable for costs except when such liability is expressly provided for
172 by an Act of Congress." *United States* v. *Patterson*, 206 F. 2d 345, 348, and authorities cited therein. See also *U. S.* v. *Poling Russell, Inc.*, 212 F. 2d 184, 185–186 (C. A. 2).

2. Nothing in the National Labor Relations Act, as amended, or in any other statute, expressly authorizes the taxation of costs against the National Labor Relations Board. Moreover, since the Board brought this action in its official capacity, it is clear that, for purposes of this suit, the Board constitutes the United States, within the meaning of 28 U. S. C., Sec. 2412 (a). Cf. *Ewing* v. *Gardner*, 341 U. S. 321; *Walling* v. *Frank Adam Elec. Co.*, 163 F. 2d 277, 283 (C. A. 8); *Walling* v. *Norfolk Southern Ry. Co.*, 162 F. 2d 95, 96 (C. A. 4).

3. Therefore, we submit that the Board in this suit is immune from the imposition of costs against it. See *Charles T. Douds, Regional Director of the Second Region of the N. L. R. B.* v. *Local 1250, Retail Wholesale Department Store Union of America, CIO*, No. 164, October Term 1948, C. A. 2, wherein the Second Circuit, after sustaining respondent's appeal from an order punishing it for violating a Section 10 (1) injunction,

denied respondent's motion for taxation of costs against the Board's Regional Director.[1]

Wherefore, it is respectfully requested that the Court delete that portion of its opinion relating to imposition of costs.

(S) Stephen Leonard,
STEPHEN LEONARD,
Associate General Counsel,
National Labor Relations Board.

APRIL 1957.

173 [Certificate of Service omitted in printing.]

174 In the United States Court of Appeals for the Fifth Circuit

No. 16180

NATIONAL LABOR RELATIONS BOARD, APPELLANT

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL., APPELLEES

UPON MOTION FOR MODIFICATION OF OPINION

Order modifying opinion

May 6, 1957

Before RIVES, TUTTLE and BROWN, *Circuit Judges.*

Per curiam:

Upon motion of the appellant, the following sentence is deleted from the last paragraph of the opinion: "One-sixth of the cost of appeal is taxed against the appellees, and the other five-sixths against the appellant." 28 U. S. C. A. 2412 (a); 29 U. S. C. A. 153 (a); Ewing v. Gardner, 341 U. S. 321; United States v. Patterson, 5th Cir., 206 F. 2d 345, 348; Walling v. Norfold Southern Ry. Co., 4th Cir., 162 F. 2d 95, 96; Compare N. L. R. B. v. Red Arrow Freight Lines, 5th Cir., 193 F. 2d 979, 981; N. L. R. B. v. Remington Rand, Inc., 2nd Cir., 130 F. 2d 919, 937.

* * * * *

175 [Clerk's Certificate in foregoing transcript omitted in printing.]

[1] It may be noted that appellees here did not even request that costs be assessed against the Board.

No. 234

October Term, 1957

[Title omitted.]

Order allowing certiorari

October 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUN 28 1957
JOHN T. FEY, Clerk

No. ~~1134~~ 234

In the Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY, JENKINS AND SONS, INC., JENKINS JEWELRY COMPANY, AND OLIVER A. JENKINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

JEROME D. FENTON,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY, JENKINS AND SONS, INC., JENKINS JEWELRY COMPANY, AND OLIVER A. JENKINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on April 2, 1957, denying the Board's request for enforcement of subpenas *duces tecum* directed to respondents.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 18–27) is reported at 243 F. 2d 427. The prior opinion of the District Court is set forth at R. 152–155.[1]

[1] "R" references are to the printed transcript of record used in the court below.

JURISDICTION

The judgment of the court below (Appendix A, p. 28, *infra*) was entered on April 2, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

Section 11 (1) of the National Labor Relations Act, as amended, provides in relevant part that the "Board, or any member thereof," shall upon application of any party to a proceeding "forthwith issue to such party" subpenas requiring testimony or the production of evidence. The section further provides that, within five days after the service of a subpena on any person requiring the production of evidence, "such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to * * * any matter in question in such proceedings, or if * * * such subpena does not describe with sufficient particularity the evidence whose production is required." The Board, by administrative regulation, has provided that applications to revoke subpenas which are returnable at a hearing shall be filed with, and ruled on in the first instance, by the trial examiner (in unfair labor practice cases) and the hearing officer (in representation cases). The rulings of the trial examiner or hearing officer are in turn subject to direct review by the Board itself, should the party take a "special appeal" to the Board.

The questions presented are:

1. Whether the Board's regulation is valid under the statute.

2. If so, whether a party whose motion to revoke subpenas *duces tecum* has been denied by the hearing officer in a representation case can properly resist a Board suit to enforce the subpenas, where he has failed to exhaust his administrative remedy of a "special appeal" to the Board from the hearing officer's ruling.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), and of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth in Appendix B, *infra*, pp. 28–35.

STATEMENT

A. The Board representation proceeding

In November 1955, Local 1625, Retail Clerks International Association, AFL–CIO, filed a petition with the Board's Regional Director pursuant to Section 9 (c) of the Act. The petition sought a representation election among the employees of a retail jewelry store in Miami, Florida (R. 13–18). When the employer moved to dismiss the petition on the ground that its operations did not meet the Board's administrative jurisdictional yardsticks, the Regional Director, on application of the Chief Law Officer, issued, over the facsimile signature of Board Member Murdock, five subpenas *duces tecum* and one subpena *ad testificandum* (R. 29–35, 36–38, 62–66, 85–89, 109–113, 136–138, 139–140).

The subpenas *duces tecum* were directed to the store where the union was claiming representation rights, to three other jewelry stores allegedly part of the same intrastate chain, and to Oliver A. Jenkins, the president of these stores, each of which is a separate corporation.[*] The subpenas to the stores required each to produce, before a hearing officer at a scheduled hearing on the representation petition, books and records showing: (1) total purchases for the year 1955; (2) purchases and sales for or on behalf of other stores in the chain during this period; and (3) the store's shareholders of record and the amount of shares issued to each (R. 36–38, 62–66, 85–89, 109–113). The subpenas further provided that, in lieu of the books and records, each store could produce a written statement of a responsible official summarizing the information which would be shown by the records (*ibid.*).

The subpenas *duces tecum* to Oliver A. Jenkins (R. 136–138) required that he produce before the hearing officer books and records showing his stock ownership in the various stores in the alleged chain, or, in lieu of the books and records, a certified statement setting forth this information. In addi-

[*] Under its applicable jurisdictional standards, the Board will assert jurisdiction over a company operating a single retail store with no interstate sales only if its direct purchases from out-of-state are at least $1,000,000 annually, or its indirect out-of-state purchases are at least $2,000,000 annually. However, even if the store does not itself satisfy these requirements, jurisdiction will nevertheless be asserted over it if it is part of an intrastate chain, and the total direct or indirect inflow of all stores in the chain satisfy the aforementioned criteria. *Haight and Knott Supermarkets*, 110 NLRB 543, 544. See also, *T. H. Rodgers Lumber Co.*, 117 NLRB No. 230.

tion, a subpena *ad testificandum* was directed to Jenkins, requiring him to appear at the representation hearing and give testimony (R. 139–140).

The stores and Jenkins (hereafter called "respondents") filed with both the Board and the hearing officer petitions to revoke the subpenas *duces tecum* on the ground, among others, that they were burdensome and had not been properly issued (R. 39–41, 67–69, 90–92, 114–117). Jenkins also filed a petition to revoke the subpena *ad testificandum* (R. 131, 146, *infra*, p. 20). The Board, calling attention to the relevant portions of its rules,[3] refused to entertain

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[3] The Rules are set forth in full in Appendix B, pp. 31–35, *infra*. The particular provisions applicable to representation cases, in relevant part, are as follows:

Sec. 102.58 (*c*): * * * Any person subpoenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however*, That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. * * * The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. * * *.

Sec. 102.57 (*c*): All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.58 (c). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the

the petitions at this stage (*infra*, pp. 20–21). The hearing officer proceeded to rule on the petitions, denying them for the reason that they raised "no substantial issue as to the validity of said subpenas" (R. 45–46).

In denying the petitions to revoke, the hearing officer offered to change the place of hearing from Miami to Jacksonville, the main office of the chain of stores, if the respondents preferred to comply with the subpenas in the latter city (*ibid.*). Respondents did not request such transfer, nor did they attempt to appeal the hearing officer's ruling on their petitions to revoke to the Board, under Sec. 102.57 [illegible] of the Board's Rules (n. 3, *supra*). Instead, when the hearing was subsequently convened, they appeared through counsel and refused to comply with the subpenas (R. 11, 49). Pursuant to Section 11 (2) of the Act, the Board then instituted proceedings against each respondent in the district court for enforcement of its subpenas (R. 6, 55, 78, 101, 126).

B. The court proceedings for enforcement of the subpenas

The district court quashed the subpenas, holding that (R. 152–155): (1) the subpenas *duces tecum* were unreasonable and oppressive; and (2) all the subpenas were invalidly issued because Section 11 (1) of

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Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record. Requests to the Board for special permission to appeal from such rulings of the regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

the Act provides that subpenas may only be issued "upon application of any party to [the] proceedings," and the Board's Regional Director is not a "party" to the representation proceeding.

The Board appealed to the court below, which held that enforcement of the subpenas *duces tecum* should have been denied because there had been no ruling by the Board on respondents' petitions to revoke. On the basis of the language of Section 11 (1) of the Act, which empowers only "the Board" to rule on petitions to revoke subpenas *duces tecum* while permitting the "Board or its duly authorized agents or agencies" to copy evidence, and the decision of this Court in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, the court below concluded that Congress intended to require the Board itself directly to rule on petitions to revoke subpenas *duces tecum* in representation cases[4] (*infra*, pp. 22–23). The court added that the provisions of the Board's rules, providing that petitions to revoke be

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[4] The court (*infra*, p. 24, n. 7) pointed out that it was not passing on the propriety of the delegation of revocation authority to a trial examiner in an unfair labor practice proceeding. The trial examiners who preside at unfair labor practice hearings, unlike the hearing officers presiding at representation hearings, are subject to, and appointed in conformity with, the requirements of the Administrative Procedure Act (5 U. S. C. A. §§ 1004 (c), 1006, 1010). Section 7 (b) of that Act (5 U. S. C. A. § 1006 (b)) provides an independent source of subpena authority for trial examiners. See *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895 (S. D. N. Y.); *National Labor Relations Board, ex rel Kohler Co.* v. *Gunaca*, 135 F. Supp. 790 (E. D. Wis.), affirmed, 230 F. 2d 542 (C. A. 7), judgment vacated as moot, 353 U. S. 902.

passed on by the hearing officer subject to a right of "special appeal" to the Board, were a nullity for: "Under the Act, we think that the Board's jurisdiction to pass on petitions to revoke subpenas *duces tecum* is original, not appellate * * *." (*infra*, p. 24).

However, finding no provision in the Act for a petition to revoke a subpena *ad testificandum*, and concluding that the other grounds relied on by the district court were insubstantial, the court below held that the district court erred in declining to enforce the one subpena *ad testificandum* (*infra*, pp. 24–26).

REASONS FOR GRANTING THE WRIT

The holding of the court below has an important impact on the administration of the Act, it is erroneous, and it presents a question concerning the proper application of this Court's decisions in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Co.*, 331 U. S. 111.

1. Section 11 (1) of the Act provides that the "Board, or any member thereof, shall upon application of any party to [unfair labor practice or representation] proceedings, forthwith issue to such party subpenas." It further provides that, within five days after the service of a subpena *duces tecum*, the person served "may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion" the evidence sought is irrelevant or the subpena does not describe it with sufficient particularity. The Board has devised the following procedure (see Rules, *infra*, pp. 31–35) for implementing these provisions:

(1) blank subpenas bearing the seal of the Board and the facsimile signature of a Board member are supplied to the Board's regional offices and trial examiners; (2) upon the application of a proper party, the Regional Director (if the request occurs prior to the hearing), or the hearing officer or trial examiner (if the request occurs at the hearing), automatically issues the subpena, which is filled out and served by the requesting party; (3) where, as here, the subpena is returnable at a hearing, the initial ruling on any petition to revoke the subpena is made by the hearing officer or trial examiner (as the case may be).

Although the hearing officer or trial examiner is thus permitted to rule on petitions to revoke in the first instance, the Board in all cases retains the power of final decision. Thus, if a petition to revoke is denied by the hearing officer or the trial examiner, Secs. 102.26 and 102.57 (c) of the Board's Rules (*infra*, pp. 31–32, 33–34) permit the party aggrieved to apply to the Board "for special permission to appeal" from such ruling. This request must be in writing, "state the grounds relied on," and a copy thereof must be served "on each other party" to the proceeding. Upon the receipt of the request, together with any responses which may be filed by the other parties, the Board itself, in deciding whether or not to grant the appeal, will review the propriety of the hearing official's ruling. Should the Board conclude that the hearing official acted reasonably, it will deny the request for a

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[8] Trial examiners hear unfair labor practice cases, whereas hearing officers generally hear representation cases. See n. 4, *supra*, p. 7.

special appeal.[6] On the other hand, should the Board conclude that the hearing official erred, it will grant the appeal and reverse or otherwise modify his ruling on the petition to revoke.[7]

Accordingly, the Board has not delegated the power which the Section 11 (1) of the Act confers upon it to rule on petitions to revoke, but has merely deferred the exercise thereof until it has first obtained the benefit of an initial decision by the official conducting the hearing.

2. In holding that the Board's power in respect to petitions to revoke subpenas is "original, not appellate", and that it cannot utilize subordinates in this preliminary fashion, the court below unsettles a practice which the Board has followed for almost 10 years under the amended Act, and, as shown *infra*, even under the Wagner Act. Moreover, the court's holding imposes upon the Board a serious burden.

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[6] For example, requests for special appeal were denied by the Board in *Avis Ford, Inc., et al.*, Nos. 7-RC-2487—97, etc., order dated November 5, 1954, on the ground that there had been no showing that the information sought to be elicited by the subpenas was not relevant to the matter under investigation. In *Sa-Mor Quality Brass, Inc.*, and *United Association of Journeymen and Apprentices, etc.*, No. 6-RC-694, and *Sterling Faucet Company* and *United Association of Journeymen and Apprentices, etc.*, No. 6-RC-695, a request for a special appeal to the Board was denied on March 11, 1952, "without prejudice to the right of the Respondents again to present the issue to the Board pursuant to provisions of the Rules and Regulations subsequent to issuance of an Intermediate Report by the Trial Examiner."

[7] For example, in *Trade Winds Company, Inc.*, and *American Federation of Labor-Congress of Industrial Organizations*, Nos. 10-CA-2692 and 10-CA-2781, the Board, by order dated February 19, 1957, having granted the request for special per-

During the fiscal year ending June 30, 1956, the Board closed 8,070 representation cases and 5,619 unfair labor practice cases, issuing formal decisions in 1,751 of the representation cases and 400 of the unfair labor practice cases.[3] During a comparable period, a total of 855 subpenas were issued in representation cases, of which 318 were subpenas *duces tecum*, and the number issued in unfair labor practice cases was about as large. Under the present procedure, the Board is required to interrupt its main decisional process for a consideration of subpoena questions in only a handful of cases, for the parties are generally satisfied with the hearing officials' rulings on petitions to revoke and thus do not undertake a "special appeal" to the Board. Under the view of the court below, however, every petition to revoke would go to the Board, and without the benefit of any preliminary screening by the hearing official. This would absorb time which the Board, already having a substantial backlog,[4] could better spend on other matters.[5] Indeed, as the Seventh Circuit pointed out in *National Labor Relations Board* v. *John S. Barnes*

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mission to appeal, reversed the ruling of the Trial Examiner and revoked the subpena on the ground that an insufficient showing had been made that the documents elicited by the subpena were material or relevant at the time. See also, *In the Matter of David Goetz, etc.*, and *Textile Workers Union of America, CIO*, No. 5-CA-467, order dated April 22, 1952.

[3] *Twenty-first Annual Report* of the National Labor Relations Board, (Gov't Print. Off., 1957), pp. 163, 165.

[4] At the close of the fiscal year ending June 30, 1956, there was a backlog of 1,444 representation cases and 2,318 unfair labor practice cases. *Twenty-first Annual Report*, *op. cit.*, p. 163. Cf. *Guss* v. *Utah Labor Board*, 353 U. S. 1, 11-12.

Corp., 178 F. 2d 156, 160: If "the Board must then, as a Board, pass upon every petition for the revocation of any subpena, it would be physically impossible for the Board and its members to perform the many other more important duties which they are required to perform to accomplish the purposes of the Act."

Moreover, hearings under the Act are conducted throughout the United States and its Territories. Requiring the Board to pass on every petition to revoke would interrupt and delay the hearing before the hearing official, for where, as is usually the case, the subpena pertains to the central issue in the proceedings, there would be no alternative but to adjourn the hearing for the period of at least several days that may be required to prepare and submit a petition to the Board in Washington and obtain its ruling thereon. A delay of this nature is particularly serious in representation cases which constitute the bulk of the Board's caseload, for, as Congress has emphasized: "When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees * * * the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on * * * or else is forced to call a strike to achieve recognition by its own economic power."[10]

[10] Leg. Hist. of the National Labor Relations Act, 1935 (Gov't Print., 1949), p. 3053. Congress was so concerned about avoiding delay in representation cases, that, under both the original and amended Acts, it rejected proposals which would

Where a petition to revoke is brought in good faith and not merely as a dilatory tactic, the petitioner, if satisfied with the ruling of the hearing official need not, under the Board's rules, pursue the matter by special appeal to the Board. As noted above, under present practice such appeals are rarely taken. If, however, every petition to revoke had to be passed upon by the Board in the first instance, not only would the Board be required to review petitions which could otherwise ordinarily be disposed of in a manner satisfactory to all parties by a preliminary screening, but an increase in the number of petitions designed solely to delay might well be anticipated as the length of time required to dispose of such petitions increased.

3. Nor could the difficulties just enumerated be alleviated, as the court below suggested (pp. 22–23, *infra*), by greater use of the Board's power to copy evidence. As this Court noted in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 364, discussed *infra*, the power to copy "is, in effect, a power of inspection at the employer's place of business *to be exercised only on his consent*". (emphasis added). Since the Board generally utilizes subpenas only when the respondent has failed to make the desired information available voluntarily, it is clear that the Board's power to copy evidence is not a satisfactory substitute for the subpena power.

Furthermore, the same distinction between the power to copy and the power to subpena existed in

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have permitted direct judicial review of Board representation determinations. See *Madden* v. *Brotherhood*, 147 F. 2d 439 (C. A. 4); *Fitzgerald* v. *Douds*, 167 F. 2d 714 (C. A. 2).

Section 11 (1) of the Wagner Act, and thereunder, as now, the Board's regulations provided for the exercise of the subpena power by the hearing official, subject to a "special appeal" to the Board itself."

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[11] Thus Section 11 (1) of the Wagner Act, in relevant part (49 Stat. 449), provided that:

> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. * * *

Implementing this, Section 203.52 (c) of the Board's Rules, Series 4, effective September 11, 1946, provided, in relevant part, that:

> Prior to the hearing, application for subpenas may be filed in writing by any party, including Board agents, with the Regional Director. The Regional Director may grant or deny the application, or may refer it to the hearing officer who may thereafter grant or deny the application. During the hearing, applications for subpenas shall be made in writing to the hearing officer, who may grant or deny the application. If any application is denied the denial shall be accompanied by a simple statement of procedural or other grounds. Such applications may be made *ex parte*, shall be timely, and shall specify the name of the witness and show the general relevance and reasonable scope of the evidence sought; and, if calling for documents, shall specify the same with such particularity as will enable them to be identified for the purposes of production. * * *

Sec. 203.51 (c), in turn, provided for "special appeals" to the Board from these rulings. See also, *Attorney General's Committee on Administrative Procedure*, S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., pp. 18–19.

Yet, in amending the Act, Congress indicated that it was making no change in the subpena procedures of the Wagner Act, except for making it a two-step rather than a one-step operation; *i. e.*, making the issuance of the subpena automatic and transferring the discretion otherwise present at this stage to a subsequent, petition to revoke, stage.[12]

4. The court below's reliance on *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, is misplaced. *Cudahy* involved a true delegation problem in that the Wage and Hour Administrator, without reserving any power of review to himself, authorized regional directors to sign and issue subpenas *duces tecum*.[13] Here, on the other hand, the Board itself has retained the power of final decision. Since a complete and unreserved delegation to a subordinate is quite a different thing from merely authorizing the subordinate to make an initial ruling which is subject to final review by the agency heads,[14] the holding in *Cudahy* that the procedure there involved was unauthorized by the applicable statute is clearly not apposite here.

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[12] Leg. Hist. of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948), pp. 562, 1543.

[13] See *Lowell Sun Co.* v. *Fleming*, 120 F. 2d 213, 215, fn. 1 (C. A. 1).

[14] Although the "one who decides must hear," this "necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department", *Morgan* v. *United States*, 298 U. S. 468, 481. See also, Section 4 (a) of the Act, which authorizes the Board to "appoint * * * an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties."

But, even if the situation here were viewed as presenting a "*Cudahy*-type problem," *Cudahy* is inapposite for the further reason that the factors which led this Court, in *Fleming* v. *Mohawk*, 331 U. S. 111, to decline to apply *Cudahy* to the Emergency Price Control Act also hold true for the National Labor Relations Act.[15]

5. Assuming the validity of the Board's rules, providing for an initial ruling on petitions to revoke subpenas by the hearing official with a right of "special appeal" to the Board, the Board was entitled to summary enforcement of the subpenas *duces tecum*. Respondents, by failing to take a "special appeal"

[15] In *Mohawk*, the Price Administrator had delegated the function of signing and issuing subpenas to regional administrators and district directors, notwithstanding that Section 202 (b) of the Emergency Price Control Act, like Section 11 (1) of the National Labor Relations Act, conferred the subpena power only on the agency head. In sustaining the delegation notwithstanding the literal language of the subpena provision itself, this Court relied on Section 201 (a) and (b) of the Emergency Price Control Act, which empowered the Administrator to perform his duties through his authorized representatives; Section 201 (d), which granted him broad rule-making power; and the fact that the Administrator's various functions were so numerous that he could hardly be expected to exercise his personal discretion in respect to each subpena (331 U. S. at 120–123).

These same considerations apply to the National Labor Relations Act. Section 5 of the Act authorizes the Board "by such agents or agencies as it may designate, [to] prosecute any inquiry necessary to its functions in any part of the United States"; Section 6 confers upon the Board a broad rule-making power; and, as we have shown pp. 11–13, *supra*, requiring the Board to pass on every petition to revoke a subpena in a representation case is a task of such proportions that Congress could not have intended this result.

to the Board from the hearing officer's denial of their petition to revoke, failed to exhaust their administrative remedies, and thus are barred from asserting their defenses in the enforcement suit. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752; *United States* v. *Sing Tuck*, 194 U. S. 161.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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JUNE 1957.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16180

NATIONAL LABOR RELATIONS BOARD, APPELLANT

VERSUS

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of Florida

(April 2, 1957)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

RIVES, Circuit Judge: The National Labor Relations Board applied to the district court for orders to enforce certain subpoenas duces tecum and ad testificandum which the Board claimed to have issued pursuant to Section 11 (1) of the National Labor Relations Act.[1] The jurisdiction of the district court

[1] § 161. *Investigatory powers of Board.*

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

"Documentary evidence summoning witnesses and taking testimony

was based on Section 11 (2) of the Act.[2] The district court "quashed" the subpoenas upon the grounds (1) that they were unreasonable, burdensome, and oppressive and (2) that they were not issued upon

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing." Title 29, U. S. C. A.

[2] "Court aid in compelling production of evidence and attendance of witnesses

"(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." Title 29, U. S. C. A. § 161 (2).

application of a "party" to the proceedings before the Board. It failed to pass upon a third ground to the effect that the applications for enforcement were premature because the Board had not itself, under Section 11 (1) [footnote (1), *supra*], considered and ruled on petitions to revoke each of said subpoenas. If the third ground is good, then there has been no such final administrative action as is prerequisite to judicial review or enforcement,[3] and, as a matter of law, there has been no contumacy or refusal to obey a subpoena." Section 11 (2) [Footnote (2), *supra*]. At the threshold, therefore, we give consideration to the third ground.

Each and all of the respondents, appellees, had filed with the National Labor Relations Board petitions to revoke the subpoenas together with requests for permission to file briefs and present oral arguments in support of their petitions. The Board, calling attention to Section 102.58 (c) of its Rules, 29 C. F. R., § 102.58 (c),[4] refused to entertain the peti-

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[3] See 42 Am. Jur., Public Administrative Law, Sec. 194.

[4] "(c) Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however*, That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing offi-

tions. The hearing officer undertook to deny the petitions to revoke. The respondents did not request "special permission of the Board" to appeal.[5]

One of the subpenas directed to appellee Oliver Jenkins was a subpoena ad testificandum, as to which there appears no provision in the Act for a petition to revoke [see Section 11 (1), Footnote (1), *supra*], and hence the application for its enforcement was not premature on that ground.

All of the other subpoenas were subpoenas duces tecum and the petitions to revoke, while not couched in the language of the statute, sufficiently raised the point of relevancy, that is, that "the evidence whose production is required does not relate to any matter under investigation or any matter in question in such proceedings." Section 11 (1), Footnote (1), *supra*. As to the subpoenas duces tecum, then, the primary question is whether the Act empowers the Board to

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cer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them." 29 C. F. R. § 102.58 (c).

[5] "Unless expressly authorized by these Rules and Regulations, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record." Section 102.57 (c) of the Board's Rules, 29 C. F. R. 102.57 (c).

delegate to hearing officers the power to pass upon such petitions to revoke.

We think that that question is answered in the negative by the carefully worded provisions of Section 11 (1) of the Act, Footnote (1), *supra*. There the gradations in authority are explicitly delimited. "The Board, or its duly authorized agents or agencies" are given access to and the right to copy evidence. Upon the application of any party, "the Board, or any member thereof" is required "forthwith" to *issue* subpoenas. At that stage there is no discretion. However, any person served with a subpoena duces tecum "may petition *the Board* to revoke, and *the Board* shall revoke such subpoena if in *its* opinion" etc. (Emphasis supplied.)

It may be, as stated in *N. L. R. B.* v. *Pesante*, S. D. Calif., 119 F. Supp. 444, 450, 451, 452, that the legislative history of the Act further supports such construction. We think, however, that the language itself of Section 11 (1) of the Act is plain, and that a different construction is not authorized by any other part of the Act nor by the Act as a whole.

The Seventh Circuit's remarks about petitions to revoke in *N. L. R. B.* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160, were necessarily dicta as it does not appear that any such petition was filed in that case.

An administrative remedy under which any person served with a subpoena duces tecum may seek protection from the Board itself to make certain that the evidence is described with sufficient particularity and is relevant to the inquiry should not, we believe, prove unduly burdensome to the Board. If it does the remedy lies with Congress, not with the courts. In most cases, methods less burdensome to the respondents than subpoenas duces tecum are available to the Board such as the right of "the Board, or its duly authorized

agents or agencies" to have access to and to copy any evidence, supplemented if need be by the use of subpoenas ad testificandum, required to be issued upon the application of any party.

The reasoning of the Supreme Court in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363, is highly persuasive that the Board has no authority to delegate its power to revoke a subpoena:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency." 315 U. S. at pp. 363–364.

Nothing in the later case of *Fleming* v. *Mohawk Co.*, 331 U. S. 111, seems to us to lead toward a different construction of the Act now under consideration.[6]

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[6] See the discussion of the *Mohawk* Case in *N. L. R. B.* v. *Pesante*, S. D. Calif., 119 F. Supp. 444, 454, 455.

Under the Act, we think that the Board's jurisdiction to pass on petitions to revoke subpoenas duces tecum is original, not appellate, that the denial of the petitions by the hearing officer was a mere nullity, and that the respondents were not required to request "special permission of the Board" to appeal. The petitions to revoke were addressed to and filed with the Board itself, and until the Board has passed upon the petitions one way or the other, there is no "contumacy or refusal to obey a subpoena" [see 11 (2) of the Act, Footnote (2), *supra*], and the matter of the enforcement of the subpoenas is not ripe for consideration of the court. We hold, therefore, that the district court should have declined to rule upon the enforcement of the subpoenas duces tecum.[7]

The subpoena ad testificandum directed to appellee Oliver Jenkins is not claimed to be oppressive or burdensome.[8] Was it properly quashed because not issued upon the application of a "party" to the proceedings before the Board? The subpoena was sought in a representation proceeding brought under Section

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[7] It should be noted that we are not passing upon the authority as to subpoenas duces tecum of a trial examiner or hearing officer in an unfair labor practice case. Representation proceedings, as distinguished from unfair labor practice cases, are somewhat removed from the purview of the Administrative Procedure Act, 5 U. S. C. A. 1001, et seq. Section 1004 specifically excepts agency hearings involving "the certifications of employee representatives" from those provisions applicable to cases of "adjudication," including, we think, the provisions of Section 1005 (c) dealing with agency subpoenas. Compare *N. L. R. B.* v. *Anchor Rome Mills*, 5th Cir., 197 F. 2d 447.

[8] In any event, courts can usually remove the oppression or burden without quashing the entire subpoena. *N. L. R. B.* v. *Anchor Rome Mills*, 5th Cir., 197 F. 2d 447, 450; *Jackson Packing Co.* v. *N. L. R. B.*, 5th Cir., 204 F. 2d 842, 844.

9 (c) of the Act, 29 U. S. C. A. 159 (c) (1).[9] The labor organization and the employer are usually adversely interested in such proceeding. The proceeding is, however, an "investigation."[10] "The employer is, in theory at least, not much concerned, since the employees are to choose their representative unhindered." *N. L. R. B.* v. *Whittier Mills Co.*, 5th Cir., 111 F. 2d 474, 478. The Board is charged with the responsibility of conducting the representation investigation, and the express terms of the statute authorize the Board to use subpoenas in aid of its investiga-

[9] "(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U. S. C. A. § 159 (c) (1).

[10] *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 706; *N. L. R. B.* v. *National Mineral Co.*, 7th Cir., 134 F. 2d 424, 426.

tions." Section 102.8 of the Board's Rules and Regulations, 29 C. F. R., Sec. 102.8, 1956 Supp., defines "party" as including "the regional director in whose region the proceeding is pending," [12] though we do not consider that important to a decision of the present question. The language of the statute authorizing the use of subpoenas in investigations, while requiring their issuance upon the application of any "party," may appear to be conflicting, but the purpose is clear.

Contrary to the district court in *N. L. R. B.* v. *Pesante, supra,* 119 F. Supp. at p. 457, we can see no objection to the Board member furnishing the subpoenas under his signature to the Regional Director to be used by the Director in such investigations as required. We think that the district court erred in declining to enforce the subpoena ad testificandum directed to Oliver Jenkins, and in not declining to rule upon the enforcement of the subpoenas duces tecum. One-sixth of the cost of appeal is taxed against the appellees, and the other five-sixths against the appellant. The judgment is reversed and the cause remanded for

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[11] Section 11 of the Act, 29 U. S. C. A. 161, Footnote 1, supra. *N. L. R. B.* v. *Anchor Rome Mills*, 5th Cir., 197 F. 2d 447, 449.

[12] "§ 102.8 *Party.* The term 'party' as used in this part shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8 (a) (1) or 8 (a) (2) of the act: but nothing in this part shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only." 29 C. F. R., 1956 Supp.

further proceedings not inconsistent with this opinion.
Reversed and Remanded.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16180

NATIONAL LABOR RELATIONS BOARD, APPELLANT,

VERSUS

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL., APPELLEES.

Upon Motion for Modification of Opinion

(May 6, 1957)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

PER CURIAM:

Upon motion of the appellant, the following sentence is deleted from the last paragraph of the opinion: "One-sixth of the cost of appeal is taxed against the appellees, and the other five-sixths against the appellant." 28 U. S. C. A. 2412 (a); 29 U. S. C. A. 153 (a); Ewing v. Gardner, 341 U S. 321; United States v. Patterson, 5th Cir., 206 F. 2d 345, 348; Walling v. Norfolk Southern Ry. Co., 4th Cir., 162 F. 2d 95, 96; Compare N. L. R. B. v. Red Arrow Freight Lines, 5th Cir., 193 F. 2d 979, 981; N. L. R. B. v. Remington Rand, Inc., 2nd Cir., 130 F. 2d 919, 937.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16180

NATIONAL LABOR RELATIONS BOARD

VERSUS

DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL.

JUDGMENT

Extract from the Minutes of April 2, 1957

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellant, National Labor Relations Board, be condemned to pay five-sixths of the costs of this cause in this Court; and that the appellees, Duval Jewelry Company of Miami, Inc., and others, be condemned, in solido, to pay one-sixth of the costs of this cause in this Court, for all of which execution may be issued out of the said District Court.

APPENDIX "B"

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * *

SEC. 9 (c) (1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * *

* * * * *

SEC. 9. (c) (1). Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

* * * * *

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such

proceedings, forthwith issue to such party subpenas, requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if, in its opinion, the evidence whose production is required does not relate to any matter under investigation or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD

(29 C. F. R. 102.1, *et seq.*, Supp. 1956)

Subpart B—Procedure under Section 10 (a) to 10 (i) of the Act for the Prevention of Unfair Labor Practices

* * * * *

SEC. 102.26 *Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal.*—All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 102.31. Unless expressly authorized by the rules and regulations, rulings by the regional director and by the trial examiner on motions, by the trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Board, pursuant to section 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

* * * * *

SEC. 102.31 *Issuance of subpenas; petitions to revoke subpenas; right to inspect or copy data.*—(*a*) Any member of the Board shall, on the written appli-

cation of any party, forthwith issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpenas filed during the hearing shall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application, on behalf of any member of the Board. Applications for subpenas may be made *ex parte*. The subpena shall show on its face the name and address of the party at whose request the subpena was issued.

(*b*) Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena upon him, petition in writing to revoke the subpena. All petitions to revoke subpoenas shall be served upon the party at whose request the subpena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The trial examiner or the Board, as the case may be,

shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the official record except upon the request of the party aggrieved by the ruling. * * *

Subpart C—Procedure under Section 9 (c) of the Act for the Determination of Questions Concerning Representation of Employees

* * * * *

SEC. 102.57 *Motions; interventions.* * * *

(c) All motions, rulings and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.58 (e). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record. Requests to the Board for special permission to appeal from such rulings of the regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party. * * *

SEC. 102.58 *Introduction of evidence; rights of parties at hearing; subpenas.* * * *

(c) Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made *ex parte*. The regional director

or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer. *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

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SUPREME COURT, U.S.
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DEC 20 1957
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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY, JENKINS AND SONS, INC., JENKINS JEWELRY COMPANY, AND OLIVER A. JENKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 234

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY, JENKINS AND SONS, INC., JENKINS JEWELRY COMPANY, AND OLIVER A. JENKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 160–166) is reported at 243 F. 2d 427. The opinion of the District Court (R. 152–155) is reported at 141 F. Supp. 860.

JURISDICTION

The judgment of the court below (R. 166) was entered on April 2, 1957. The petition for a writ of certiorari was filed on June 28, 1957, and granted on October 14, 1957. The jurisdiction of this Court rests on 28 U. S. C. 1254.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), and of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth in Appendix A, *infra*, pp. 55–61.

QUESTIONS PRESENTED

Section 11 (1) of the National Labor Relations Act, as amended, provides in relevant part that the "Board, or any member thereof," shall upon application of any party to a proceeding "forthwith issue to such party" subpenas requiring testimony or the production of evidence. The section further provides that, within five days after the service of a subpena on any person requiring the production of evidence, "such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to * * * any matter in question in such proceedings, or if * * * such subpena does not describe with sufficient particularity the evidence whose production is required." The Board, by administrative regulation, has provided that applications to revoke subpenas which are returnable at a hearing shall be filed with, and ruled on in the first instance, by the trial examiner (in an unfair labor practice case) and the hearing officer (in a representation case). The rulings of the trial examiner or hearing officer are in turn subject to direct review by the Board itself, should the party take a "special appeal" to the Board.

The questions presented are:

1. Whether the Board's regulation is valid under the Act, so that the petitions to revoke the subpenas *duces tecum* which respondents had filed directly with the Board were properly referred by it to the hearing officer for his initial ruling.

2. Assuming an affirmative answer to the first question, whether respondents have standing to resist a Board suit to enforce the subpenas where, after the hearing officer denied their petitions to revoke, they failed to exhaust their administrative remedy of a special appeal to the Board from his ruling.

STATEMENT

A. THE BOARD REPRESENTATION PROCEEDING

In November 1955, Local 1625, Retail Clerks International Association, AFL–CIO, filed a petition pursuant to Section 9 (c) of the Act with the Board's Regional Office. The petition sought a representation election among the employees of a retail jewelry store in Miami, Florida (R. 13–18). At the hearing held on the petition, the employer filed a motion to dismiss the proceeding on the ground that his interstate operations did not meet the Board's administrative standards for the assertion of jurisdiction. He refused, however, to testify or furnish information on this issue, whereupon the hearing was adjourned for the purpose of permitting subpenas to be issued to secure the relevant data and testimony. Five subpenas *duces tecum* and one subpena *ad testificandum* were then issued. In accordance with the Board's regulations

and practice, they were issued by the Regional Director upon application of the Board attorney assigned to the case, and contained the facsimile signature of a Board member, here Member Murdock (R. 29–35, 36–38, 62–66, 85–89, 109–113, 136–138, 139–140).

The subpenas *duces tecum* were directed to the store where the petitioning union was claiming representation rights, to three other jewelry stores allegedly part of the same intrastate chain, and to Oliver A. Jenkins, the president of these stores, each of which is a separate corporation.[1] The subpenas to the stores required each to produce, before a hearing officer at a scheduled hearing on the representation petition, books and records showing: (1) total purchases for the year 1955; (2) purchases and sales for or on behalf of other stores in the chain during this period; and (3) the store's shareholders of record and the amount of shares issued to each (R. 36–38, 62–66, 85–89, 109–113). The subpenas further provided that, in lieu of the books and records, each store could produce a written statement of a responsible official summarizing the information which would be shown by the records (*ibid.*).

[1] Under its applicable jurisdictional standards, the Board will assert jurisdiction over a company operating a single retail store with no interstate sales only if its direct purchases from out-of-state are at least $1,000,000 annually, or its indirect out-of-state purchases are at least $2,000,000 annually. However, even if the store does not itself satisfy these requirements, jurisdiction will nevertheless be asserted over it if it is part of an intrastate chain, and the total direct or indirect inflow of all stores in the chain satisfy the aforementioned criteria. *Hogue and Knott Supermarkets*, 110 N. L. R. B. 543, 544. See also, *T. H. Rodgers Lumber Co.*, 117 N. L. R. B. 1732.

The subpenas *duces tecum* to Oliver A. Jenkins (R. 136–138) required that he produce before the hearing officer books and records showing his stock ownership in the various stores in the alleged chain, or, in lieu of the books and records, a certified statement setting forth this information. In addition, a subpena *ad testificandum* was directed to Jenkins, requiring him to appear at the representation hearing and give testimony (R. 139–140).

The stores and Jenkins, the respondents herein, filed motions to revoke the subpenas *duces tecum*, both with the Board and with the hearing officer, alleging, *inter alia*, that they were burdensome and had not been properly issued (R. 39–41, 67–69, 90–92, 114–117, 141–142). Jenkins also filed a petition to revoke the subpena *ad testificandum* (R. 131, 146). The Board refused to entertain the petitions to revoke filed with it, referring respondents to the provisions in its Rules and Regulations (*infra*, pp. 16–17) which require an initial ruling on such petitions by the hearing officer (R. 161–162). The hearing officer, in accordance with the Board's regulations, proceeded to consider the petitions to revoke. He granted respondents' request for leave to file briefs and to argue orally,[2] and thereafter denied the petitions for the reason that they raised "no substantial issue as to the validity of said subpenas" (R. 43–46).

In denying the petitions to revoke, the hearing officer offered to change the place of hearing from Miami

[2] Respondents, however, chose not to avail themselves of either opportunity (R. 45–46).

to Jacksonville, the main office of the stores, if the respondents preferred to comply with the subpenas in the latter city (R. 45–46). Respondents did not request such transfer, nor did they attempt to appeal the hearing officer's ruling on their petitions to revoke to the Board, under Sec. 102.57 (c) of the Board's Rules (*infra*, p. 18). Instead, when the hearing was reconvened for the purpose of adducing the evidence sought by the subpenas, respondents appeared through counsel and refused to comply with the subpenas (R. 11, 49). Pursuant to Section 11 (2) of the Act, the Board then instituted the instant proceedings against each respondent in the District Court for enforcement of the subpenas (R. 6, 55, 78, 101, 126).

B. THE COURT PROCEEDINGS FOR ENFORCEMENT OF THE SUBPENAS

Following hearing, the District Court quashed all of the subpenas (R. 152–155). The Court found that the subpenas *duces tecum* were unreasonable and oppressive. It further found that all of the subpenas were invalidly issued because they were not issued "upon application of any party to [the] proceedings," as required by Section 11 (1) of the Act, the court holding that the Board's Regional Director was not a "party" to the representation proceeding (*ibid.*).

On appeal, the court below sustained the District Court's refusal to enforce the subpenas *duces tecum*, but held that it should have enforced the subpena *ad testificandum*. In the view of the court below, "the matter of the enforcement of the subpenas [*duces*

tecum]" is not ripe for consideration," because the Board itself had not ruled upon the petitions to revoke. Noting that Section 11 (1) of the Act mentioned only the Board in providing for rulings on petitions to revoke, and relying on this Court's decision in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, holding that the Wage and Hour Administrator lacked power to delegate his subpena power to subordinates, the court below concluded that Congress intended to require the Board alone to rule on petitions to revoke subpenas *duces tecum* in representation cases. Accordingly, in the view of the court below, the Board's Rules which provide for initial rulings by hearing officers upon petitions to revoke subpenas, subject to the right of "special appeal" to the Board, were an attempt to make an unauthorized delegation, and the denial by the hearing officer of the petitions to revoke was thus a nullity. (R. 162–164.)

With respect to the subpena *ad testificandum*, the court below held that the failure of the Board itself to rule on the petition to revoke did not render proceedings to enforce that subpena premature, for "there appears no provision in the Act for a petition to revoke [such subpenas]" (R. 162). Concluding further that the subpena was issued on application of a "party," the Regional Director, the court below reversed the District Court in this respect (R. 166).[3]

[3] Review has not been sought of the judgment of the court below respecting the subpena *ad testificandum;* accordingly, no question as to that phase of the case is before this Court.

SUMMARY OF ARGUMENT

I

The Board's procedure for handling petitions to revoke subpenas is valid under the Act.

A. Section 11 (1) of the Act requires the Board to issue a subpena on request, but provides that the party subpenaed may petition the Board to, and the Board shall, revoke the subpena if it appears to be improper. By its Rules implementing Section 11 (1), the Board has provided that after the hearing has opened in a representation case, as here, petitions to revoke subpenas must be filed with the hearing officer and will be determined by him in the first instance. Provision is made, however, for the party aggrieved by a hearing officer's ruling to seek leave of the Board to take an immediate interlocutory appeal from his ruling. When a request for leave to appeal is filed, the Board reviews the hearing officer's initial decision. If the Board concludes that the request does not present a substantial question, it denies the request. On the other hand, where the underlying question is novel or substantial, and an immediate decision is warranted in order to avoid irreparable harm, the Board either grants the request, or, if no further showing need be made, reverses or modifies forthwith the hearing officer's ruling. Moreover, even where the request for permission to appeal is denied, any party aggrieved thereby is entitled to present the matter to the Board when the full case comes before it in the ordinary course.

B. Contrary to the view of the court below, the foregoing procedure does not involve a delegation to the hearing officer of the Board's decisional authority in respect to subpenas. Accordingly, no question is really presented as to the Board's authority under the Act to make such a delegation.

The essence of a delegation of authority is the tranmission of the power of final judgment from the party in whom it originally has been vested to a subordinate. The Board, however, has retained ultimate decisional control in subpena matters, and utilizes subordinate officials only to make preliminary rulings. The Board's decisions on review, moreover, are not *pro forma*, but as the cases show, involve a full and original consideration of the issues. Hence, the Board's procedure for handling petitions to revoke subpenas satisfies Section 11 (1) of the Act even if that provision be literally interpreted so as to forbid delegation by the Board of authority to determine the propriety of subpenas.

C. If, however, the Board's procedure for determining the validity of subpenas were to be viewed as a delegation of decisional authority to hearing officers, such a delegation is fully authorized by the Act. This conclusion is supported by all the relevant considerations stated by this Court in the two leading cases relating to the delegation of subpena powers by an administrative agency, *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111.

1. Sections 4 (a), 5 and 9 (c) of the Act explicitly empower the Board to delegate to subordinate officials

the authority to investigate and conduct hearings in representation cases. The handling of subpena questions is "a necessary incident to the power to investigate," and thus may reasonably be implied to be delegable to the same officials whom the Board designates to conduct such investigations and hearings. *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 159 (C. A. 7). Indeed, because the efficient investigation and hearing of a representation case depends upon the subpena power, authority of the Board to delegate this power should be no less than it is in other situations throughout the Act, where, although functions are explicitly vested in the Board alone, it is unquestioned that these functions could only be exercised through subordinates. Authority to delegate subpena powers is controlled by the principle that the specification of statutory purposes confers upon the administering body the implied authority to fashion "the necessary means to accomplish those objects." *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 259.

2. In the *Mohawk* case, *supra*, this Court supported its holding that the Emergency Price Control Act impliedly authorized the delegation of subpena powers on the ground, *inter alia*, that the statute contained a broad rule-making power. Section 6 of the National Labor Relations Act grants an equally broad rule-making power to the Board. Accordingly, this is an additional source of authority for the Board's requirement that initial rulings on subpena questions be made by the hearing official.

3. The magnitude of the Board's case load and the large number of subpenas which are regularly issued in connection therewith plainly show that it is not feasible administratively to require direct Board rulings in the first instance as to the propriety of all challenged subpenas. Moreover, to require such Board rulings would inevitably delay final decision in representation cases, a result contrary to the expressed wishes of Congress. Here, as in the *Mohawk* case, *supra*, the statute should not be construed to render it unworkable.

4. When Congress amended Section 11 (1) of the Act in 1947 it indicated that it wished to alter the existing Board practice respecting subpenas in only one respect—*i. e.*, to defer the determination of the propriety of a subpena from the issuance stage to a subsequent, petition to revoke, stage. Since a determination of the subpena's propriety was made by hearing officers in the first instance under the Wagner Act, pursuant to Board Rules paralleling those under the amended Act, it follows that Congress contemplated that the same practice was to be continued at the petition to revoke stage of the proceeding. This conclusion is strengthened by the fact that the Board's practice under the Wagner Act was well known to Congress when the 1947 amendments were passed. The Congressional desire to continue that practice negatives any adverse inference that might otherwise be drawn from the unexplained elimination by the Senate and House conferees of provisions in the House bill which explicitly granted subpena powers to the Board or its agents.

II

The failure of respondents to exhaust their administrative remedy of a special appeal to the Board, pursuant to regulations shown to be valid, requires summary enforcement of the subpenas.

The Board's Rules respecting subpenas, which are shown to be valid, provided respondents an opportunity, through the special appeal procedure, to obtain Board review of the hearing officer's rejection of their contentions that the subpenas were improper. By failing to avail themselves of this procedure, respondents did not exhaust their administrative remedy before submitting their position to the District Court. Under settled doctrine, respondents were thus barred from asserting their defenses in the enforcement suit, and the District Court should have enforced the subpenas forthwith.

ARGUMENT

INTRODUCTION

The subpenas *duces tecum* which respondents have refused to obey were directed to the production of evidence relating to the question whether the employer's operations had sufficient impact on interstate commerce to warrant assertion of jurisdiction by the Board under its self-imposed jurisdictional limitations. See *Guss* v. *Utah Labor Board*, 353 U. S. 1, 3–4; n. 1, p. 4, *supra*. The propriety of inquiring into this matter in an investigation of a petition under Section 9 of the Act, as well as the necessity of doing so by subpena where, as here, the employer refuses

to furnish the underlying information voluntarily, cannot be gainsaid. Nor is it questioned that the procedure followed in issuing the subpenas, and in determining their validity when petitions to revoke were filed, was in full conformity with the Board's Rules and Regulations. The critical question in this case is whether the procedure itself is authorized by the Act insofar as it provides for the hearing officer in a representation case, upon the filing of petitions to revoke subpenas, to make the initial ruling as to the validity of the subpenas.

The conclusion of the court below that the vesting of this function in the hearing officer constitutes a delegation of power unauthorized by the Act is contrary to the views of two other Courts of Appeals,[4]

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[4] *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160 (C. A. 7); *National Labor Relations Board* v. *Lewis*, 41 LRRM 2078 (C. A. 9), decided October 29, 1937. Although, as the court below noted (R. 163), the statement in *Barnes* with respect to petitions to revoke was dictum because only the validity of *issuance* of the subpena was challenged in that case, the Seventh Circuit subsequently affirmed its views upholding the Board's procedure as to petitions to revoke in a case where that question was directly presented. *National Labor Relations Board, ex rel. Kohler Co.* v. *Gunaca*, 135 F. Supp. 790, 793–795 (E. D. Wis.), affirmed, 230 F. 2d 542 (C. A. 7), order granting certiorari vacated, 353 U. S. 902. Nor is the relevance of *Gunaca* and *Lewis* diminished by the fact that they involved a trial examiner in an unfair labor practice, who, unlike the hearing officers presiding at representation hearings (the situation here), are subject to, and appointed in conformity with, the requirements of the Administrative Procedure Act (5 U. S. C. 1004 (c), 1006, 1010). Although Section 7. (b) of that Act (5 U. S. C. § 1006 (b)) provides an independent source of authority for trial examiners, the Ninth Circuit in *Lewis* relied exclusively, and the Court in

and would upset an administrative interpretation of the Act which has been followed continuously since the Act was amended in 1947, and, indeed, was followed under the Wagner Act as well (*infra*, pp. 41–43). In Point I below, we shall show that the Board's procedure is in fact consistent with the statute. More specifically, we shall show (1) the nature of the statutory authority respecting subpenas and the manner in which the Board exercises this power; (2) that, properly understood, the Board's subpena procedures do not present a delegation problem at all, in that the Board itself retains the power of final decision in each case; and (3) that, even if there were a full delegation of Board authority to the hearing officer in respect to ruling on petitions to revoke subpenas, the Act would not preclude such delegation. We shall also show—in Point II below—that respondents, who did not invoke the special appeal provisions under the Board's rules after the denial of their petitions to revoke by the hearing officer, failed to exhaust their administrative remedies. Consideration in an enforcement proceeding of respondents' other defenses to the subpenas is, therefore, precluded and the Board is entitled to a summary enforcement order.

Gunaca relied primarily, on the scheme of the National Labor Relations Act itself in sustaining the Board's procedure in respect to petitions to revoke. Indeed, in its opinion in *Lewis*, the Ninth Circuit expressly disagreed with the decision of the court below (41 LRRM at 2080–2081). See also, *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895 (S. D. N. Y.).

I

THE BOARD'S PROCEDURE FOR HANDLING PETITIONS TO REVOKE SUBPENAS IS VALID UNDER THE ACT

A. THE MANNER IN WHICH THE BOARD EXERCISES THE SUBPENA POWER CONFERRED ON IT BY THE ACT

The statutory procedure governing the issuance and revocation of subpenas is contained in Section 11 (1) of the Act, which in relevant part reads:

> For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10--
>
> (1) * * * The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required * * *.

The exercise of the Board's subpena power is thus divided into two steps. The first step, as to which no question is presented in this case, relates to the

grant of subpenas. This step is mandatory; the issuance of a subpena must be "forthwith" upon application. The second step, on petition to revoke, brings into play, for the first time, the power to rule upon the validity of the subpena already issued.

The Board has devised the following procedure for implementing the statutory provisions: (1) blank subpenas bearing the seal of the Board and the facsimile signature of a Board member are supplied to the Board's regional offices and trial examiners; (2) upon the application of a proper party, the Regional Director (if the request occurs prior to the hearing), or the hearing officer or trial examiner (if the request occurs at the hearing), automatically issues the subpena, which is filled out and served by the requesting party; (3) where, as here, the subpena is returnable at a hearing, the initial ruling on any petition to revoke the subpena is made by the hearing officer or trial examiner.[5] Thus, Section 102.58 (c) of the Board's Rules and Regulations, governing subpenas in representation cases, reads:

> Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made *ex parte*. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not

[5] Trial examiners hear unfair labor practice cases, whereas hearing officers generally hear representation cases. See n. 4, p. 13, *supra*.

intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer. *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the record except upon the request of the party aggrieved by the ruling * * *.

The authority of the hearing official to rule on petitions to revoke is not unqualified. The Board retains an overriding control by further providing that any party aggrieved by a hearing officer's ruling may, "by special permission of the Board," appeal that ruling directly to the Board for immediate Board re-

view thereof. This is reflected in Section 102.57 (e) of the Board's Rules, which states:

> All motions, rulings and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.58 (c). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board *except by special permission of the Board,* but shall be considered by the Board when it reviews the entire record. *Requests to the Board for special permission to appeal* from such rulings of the regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.[6] * * * [Emphasis added.]

In practice, this appeal procedure works as follows: Where a party aggrieved by a hearing officer's initial ruling wishes to take advantage of the special appeal procedure, he files a request for leave to appeal with the Board, stating the grounds relied on, and serves a copy thereof on the other parties to the proceeding. Upon receipt of this request, together with any responses filed by the other parties, the Board itself, in deciding whether to grant the appeal, will review the propriety of the hearing officer's ruling. If the Board concludes that no substantial question has been raised

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[6] The comparable provision for unfair labor practice cases is Section 102.26; pp. 59–60, *infra*.

concerning the validity of the initial ruling, it will deny the request for the special appeal.[7] On the other hand, should the Board conclude that the request raises a novel or substantial question and that an immediate decision is appropriate, it grants leave to appeal, or, if the request and the responses thereto adequately present the problem, it may forthwith reverse or otherwise modify the hearing officer's ruling on the petition to revoke the subpena.[8]

Moreover, even where no special appeal is taken or leave to appeal is denied, the Board still retains a reviewing power over the hearing officer's rulings on petitions to revoke. The Board receives the entire record of each case following the hearing, and any party aggrieved by a hearing officer's ruling on a petition to revoke a subpena is entitled to have included in the record his petition and that ruling. Section 102.58 (c) of the Board's Rules and Regulations (*supra*, pp. 16–17). Upon the transfer of the case to it, the Board fully considers and determines all questions which the parties have presented, including any subpena questions. Section 9 (c) of the Act; Sections 102.59 and 102.60, Board's Rules and Regu-

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[7] Board rulings on requests for special permission to appeal from rulings on petitions to revoke subpenas are not published. Several examples of Board orders denying such requests are reprinted *infra*, in Appendix B. As these show, the Board may, in appropriate cases, note that the denial of the request to appeal is without prejudice to the right to renew the issue when the record is thereafter presented to the Board for decision in the regular course of procedure (see *infra*, p. 65).

[8] Orders in four such cases are reprinted in Appendix B, *infra*, pp. 66–70, by way of example.

lations (pp. 56, 61, *infra*). Thus, the special appeal procedure enables the Board to review a subpena question in the situation where an immediate Board ruling is required in order to preserve the position of a party or prevent irreparable injury. Absent these conditions, the Board may defer its power of review until the entire case is transferred to it in normal course. For example, revocation of a subpena by the hearing officer ordinarily would not warrant interim Board review under the "special appeal" procedure. But, when the full case is before it, the Board will pass upon the revocation ruling, and, if it finds it to have been erroneous and that the evidence sought is essential to a decision of the issues, the Board will reverse the hearing officer's ruling and remand the case to him for introduction of the evidence called for in the subpena.[9]

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[9] Illustrative of cases where the Board, upon the regular transfer of the proceeding to it, has reviewed and rendered its decision on petitions to revoke previously ruled upon by a hearing officer, are *The Hertner Electric Co.*, 115 N. L. R. B. 820, 821–822; *Bell Aircraft Corp.* 98 N. L. R. B. 1277, 1282, n. 4; *International Furniture Co.*, 106 N. L. R. B. 127, 128, n. 2; *Jamestown Sterling Corp.*, 106 N. L. R. B. 466; *Burnup & Sims, Inc.*, 95 N. L. R. B. 1130, n. 1; *Morrison Turning Co., Inc.*, 83 N. L. R. B. 687. Furthermore, where the Board has already ruled on a petition to revoke in a special appeal, it will review its own ruling if the aggrieved party continues to press the matter, when the case comes to it on the full record. See, *New Britain Machine Co.*, 105 N. L. R. B. 646, n. 1; *The Midvale Co.*, 114 N. L. R. B. 372, 374. Note also *International Broadcasting Corp. (KWKH)*, 102 N. L. R. B. 1434, where, on its own motion, the Board undertook to determine and dispose of an outstanding subpena which had neither been complied with nor enforced.

B. SINCE THE BOARD RETAINS AN OVERRIDING DECISIONAL AUTHORITY IN EVERY CASE, THERE HAS BEEN NO TRUE DELEGATION OF THE BOARD'S POWER TO RULE ON PETITIONS TO REVOKE SUBPENAS

In the light of the foregoing description of the manner in which the Board exercises its subpena power, we submit that the court below erred in viewing the issue here to be "whether the Act empowers the Board to *delegate* to hearing officers the power to pass upon * * * petitions to revoke [subpenas]" (R. 162). (Emphasis added.) Since the Board has retained authority to review the hearing officer's rulings on petitions to revoke subpenas, there has not been a true delegation of the Board's power over petitions to revoke, but merely a deferment of its exercise until the Board has first obtained the benefit of an initial decision by the official conducting the hearing.[10]

The essence of a delegation of authority is the transmission of the power of final judgment from the person in whom it originally has been vested to a subordinate. See *Runkle* v. *United States*, 122 U. S. 543, 557.[11] But where, as here, ultimate control is re-

[10] If this view be accepted, it follows that *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, relied on by the court below, is inapposite. That case (discussed more fully, pp. 25, 26, n. 15, 30–32, *infra*) involved a true delegation in that the Wage and Hour Administrator, in authorizing regional directors to sign and issue subpenas *duces tecum*, reserved no power of review. See the Administrator's regulations, set forth in *Lowell Sun* v. *Fleming*, 120 F. 2d 213, 215, fn. 1 (C. A. 1), a companion case to *Cudahy*.

[11] See also, Davis, *Administrative Law* (West Pub. Co., 1951), p. 74; *Williams* v. *United States*, 1 How. 290, 296–297; *In re Triangle S. S. Co.*, 3 F. 2d 894, 896 (C. A. 2), certiorari denied, *sub nom. United States* v. *Maurice F. Davidson, Trustee, etc.*,

tained by the superior and the subordinate is utilized to consider preliminarily, or to give advice, there has been no improper delegation of functions which the statute requires the superior to perform. See *Eagles* v. *Samuels*, 329 U. S. 304, 315–316; *Southern Garment Manufacturers' Association* v. *Fleming*, 122 F. 2d 622, 626–627 (C. A. D. C.). Cf. *Morgan* v. *United States*, 298 U. S. 468, 481 (the law "does not preclude practicable administrative procedure in obtaining the aid of assistants in the department").

The Board's procedure for handling petitions to revoke subpenas satisfies these criteria. As we have shown (pp. 17–20, *supra*), although all petitions to revoke subpenas returnable at a hearing must first be passed on by the hearing officer, full opportunity is afforded for a Board review of each ruling. To be sure, the majority of subpena questions are finally determined without any appeal to the Board, *i. e.*, without invoking the special appeal machinery or contesting the hearing officer's ruling following the transfer of the case to the Board. However, this is a consequence of the nature of the objections which are raised, and the fact that these objections, often dilatory in character, are frequently abandoned. Whenever a party is dissatisfied with the hearing officer's ruling, the machinery exists whereby he may obtain review by the Board itself. Moreover, such review is not *pro forma*, but involves a full and original consideration of the issues. Thus, the Board

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267 U. S. 597; *West Springfield* v. *Mayo*, 265 Mass. 41, 163 N. E. 653, 654; Grundstein, *Subdelegation of Administrative Authority*, 13 Geo. Wash. L. Rev. 144, 193–194.

does, in fact, reverse the hearing officers' rulings when such action is deemed appropriate.[12] And, even where hearing officers are upheld, the Board decision reflects its independent judgment.[13] Nor is the extent of the Board's control lessened by the circumstance that an immediate appeal from the hearing officer's ruling does not exist as of right, but requires the "special permission" of the Board. For, as pointed out pp. 18–19, *supra*, the Board, in determining whether or not to authorize the appeal, decides whether a substantial question has been raised concerning the validity of the hearing officer's ruling, and whether its resolution requires immediate Board intervention. Accordingly, even where permission to appeal is denied, there has been, at the very least, a judgment by the Board itself that the petition to revoke does not raise a problem warranting Board action at that stage of the proceedings.[14]

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[12] In addition to the cases referred to in notes 8 and 9, *supra*, see, *e. g.*, *International Furniture Co.*, 106 N. L. R. B. 127, 128, n. 2; *Coulter Jones & Son*, 89 N. L. R. B. 1146, n. 1; cf. *General Furniture Corp.*, 109 N. L. R. B. 479, 480, n. 2.

[13] In addition to the cases referred to in notes 7 and 9, *supra*, see, *e. g.*, *Meridian Plastics, Inc.*, 108 N. L. R. B. 203, 204; *Bill Heath, Inc.*, 89 N. L. R. B. 67, 68; compare *Tomlinson of High Point, Inc.*, 74 N. L. R. B. 681, 683–686.

[14] Moreover, since respondents did not request the Board for special permission to appeal from the hearing officer's ruling on their petitions to revoke (p. 6, *supra*), their contention that the Board's procedures are invalid cannot be determined upon the assumption that such appeal would have been denied. That is, it must be assumed, at least for purposes of this case, that the Board would have granted leave to appeal the hearing officer's ruling, if sought by respondents, and thus would necessarily have been required to consider fully and determine respondents'

In sum, if Section 11 (1) of the Act, in providing that "the Board shall revoke" subpenas, were deemed to require that the Board itself must exercise the ultimate decision on petitions to revoke, this occurs under the Board's procedure. The language of Section 11 (1) does not suggest that a Board determination of the issues raised by a petition to revoke a subpena need be made at any particular stage of a case, or that the Board may not benefit from the preliminary expression of views of a hearing officer. Cf. *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 706–707. The Board's procedure goes no further. It utilizes the hearing officer, who is ordinarily in the best position to assess the relevance of the data sought, to make the initial ruling on a petition to revoke, and in this way most cases can proceed expeditiously and without interruption, a particularly important objective in representation proceedings (see pp. 37–38, *infra*). However, opportunity is afforded in every case for obtaining Board review should the parties desire, and the Board will, if the situation warrants it, modify the hearing officer's ruling. In these circumstances, the Board retains the power of ultimate judgment, and thus there has been no true delegation of the Board's authority over petitions to revoke subpenas.

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claim that the subpenas were improper. Cf. *Smith* v. *Cahoon*, 283 U. S. 553, 562; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47; *Utley* v. *St. Petersburg*, 292 U. S. 106, 110.

C. IN ANY EVENT, THE ACT AUTHORIZES THE BOARD TO DELEGATE THE POWER TO RULE ON PETITIONS TO REVOKE SUBPENAS TO HEARING OFFICERS IN REPRESENTATION CASES

If, however, the Board's procedure for determining the validity of the subpenas in this case is to be treated as a delegation of decisional authority to the hearing officer, as assumed by the court below but contrary to what we have shown in "B" *supra*, we nonetheless believe that the procedure is fully valid under the Act. The factors relevant in ascertaining whether the agency possesses authority to make such a delegation were analyzed by this Court in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111. Both *Cudahy* and *Mohawk* involved statutory provisions whose language explicitly conferred subpena power only upon the agency head. In *Cudahy*, the Court concluded that the Fair Labor Standards Act precluded the Administrator of the Wage and Hour Division of the Department of Labor from delegating his power to sign and issue subpenas. In *Mohawk*, however, where the relevant provisions of the Emergency Price Control Act were "practically identical" with those in the Fair Labor Standards Act (331 U. S. at 120), the power to delegate was found to be impliedly vested in the Price Administrator. Together, these cases establish, at the very least, that, contrary to the reasoning of the court below (R. 162), neither the absence of an express power to delegate subpena determinations nor the presence of unqualified language conferring subpena authority upon the

agency head, is necessarily controlling in deciding whether the authority to delegate exists. Rather, the answer to the question turns upon Congressional intent as ascertained from a consideration of the subpena provision in the light of the structure of the statute as a whole, the legislative history, and the function which the statute confers upon the agency.[15]

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[15] Certain portions of the opinions in *Cudahy* and *Mohawk* appear to suggest that the only question decided in those cases was whether the agency head could properly delegate the function of signing the subpena and that no consideration was given to whether he could also delegate the function of issuing the subpena. Thus, the opinion in *Cudahy*, after noting that the Wage and Hour Administrator had delegated both the power to sign and issue subpenas, pointed out that there were some agencies where "the actual issuance of subpenas, though not their signing, is delegated to subordinates * * *." The Court concluded that it was "*not concerned here with the validity of such a practice* * * *" (315 U. S. at 365, n. 8; emphasis added.) (The Monograph on the National Labor Relations Board prepared by the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, 77th Cong., 1st Sess., Part 5, pp. 18–19, which the Court cited, indicates that the Board was one of the agencies which utilized this procedure. See also, p. 42, *infra*.)

Similarly, in *Mohawk*, a concern only with the signing question is suggested by the statement at the end of the opinion that: "To tempt the Administrator to solve the problem by supplying all his offices with subpoenas signed in blank would not further the development of orderly and responsible administration" (331 U. S. at 123).

We do not believe, however, that these statements, read in the light of the opinions as a whole, warrant the conclusion that the Court, in discussing the problem of who shall sign the subpena, was considering only a ministerial function. The discretion involved in issuing a subpena may be exercised at the time the subpena is signed, or the signature may be affixed in advance, with the judgment respecting use of the subpena

Cf. *National Labor Relations Board* v. *Lewis*, decided October 29, 1957, 41 LRRM 2078 (C. A. 9); *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 159 (C. A. 7). Accordingly, we analyze be-

reserved for the time when one is requested. The opinions in *Cudahy* and *Mohawk*, taken as a whole, establish that the Court was ruling on the delegability of the agency head's full subpena power, including the power to decide the propriety of the subpena itself. Thus, in *Cudahy*, the Court described the question to be whether the agency head had authority to delegate his statutory power "to sign and issue" subpenas (315 U. S. at 358). Moreover, in supporting its conclusion that the subpena power under the Fair Labor Standards Act was non-delegable with the consideration that such power is "capable of oppressive use, especially when it may be indiscriminately delegated" (315 U. S. at 363), the Court seems clearly to be talking about the power to determine whether a subpena is proper, and not about ministerial acts incidental to its use. In addition, the terms of the delegation of the Administrator to his subordinates in *Cudahy* show that the function delegated was discretionary. See, Confidential Inspection Manual of the Wage and Hour Division, reprinted in Appendix C of the Government's brief in *Fleming* v. *Lowell Sun Co.* (companion case to *Cudahy*), No. 529, October Term, 1941, pp. 71, 73–75.

Similarly, in *Mohawk* the Court phrased the question presented as covering the delegability of the power "to sign and issue" subpenas (331 U. S. at 113). Moreover, the portion of the opinion quoted above need not be read as a restriction of the question decided to the delegability of the ministerial act of signing subpenas, but only as revealing the Court's apprehension that, to deny the Administrator the right to delegate his subpena powers *in full*, would, "in view of the magnitude of the task" involved in having him exercise his "personal discretion" in each case, necessarily force him to make only a token exercise of those powers by supplying subordinate officers with subpenas signed in blank (*Id.* at 122–123). Finally, the terms of the delegation of the Administrator to his subordinates made clear, as did the analogous delegation in *Cudahy*, that the exercise of discretionary judgment was involved. See O. P. A. Manual, Sec. 9: 2201.04 (c), quoted at p. 30, n. 21 in the Government's brief in the *Mohawk* case, Nos. 483, 512 and 583, October Term, 1946.

low these factors with reference to the National Labor Relations Act, and show that on balance they weigh decisively in favor of Board authority to delegate its power to rule on petitions to revoke subpenas.[16]

1. *The Board has statutory authority to designate agents to investigate and conduct hearings in representation cases*

The National Labor Relations Act explicitly empowers the Board to designate subordinate officials to investigate and conduct hearings in representation cases, the kind of proceeding in furtherance of which the subpenas in this case were issued. Thus Section 4 (a) in relevant part reads:

> The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties.

Section 5 adds:

> The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may desig-

[16] Although no petition to revoke was involved in *Cudahy* and *Mohawk*, the determination made by the subordinate in those cases in passing upon the request for a subpena was analogous to ruling on petitions to revoke Board subpenas. That is, as shown (n. 15, *supra*), under the Fair Labor Standards and the Emergency Price Control Acts the ruling on an application for a subpena entailed the exercise of discretion; under the Labor Act, as amended, the subpena is issued automatically, with the discretion being transferred to a subsequent, petition to revoke, stage (see pp. 44–49, *infra*).

nate, prosecute any inquiry necessary to its functions in any part of the United States.

And, Section 9 (c) specifically provides that the hearing in a representation case "may be conducted by an officer or employee of the regional office."[17] These provisions clearly contemplate that the prosecution of "any inquiry necessary to [the Board's] functions"—here an investigation of a representation petition[18]—"may properly be performed by someone other than the Board members themselves," even where such functions are in terms conferred only on the Board. *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 887 (S. D. Ind.).

Section 3 (d) of the Act confirms this conclusion. That section makes a separate grant of powers to the General Counsel of the Board, including the power of "general supervision over * * * the officers and employees in the regional offices," and states further that the General Counsel "shall have such other duties

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[17] Section 9 (c) also prohibits the hearing officer from making "any recommendations with respect [to the hearing]." The purpose of this qualification was to eliminate the "comprehensive report and recommendation to the Board" which, under the Wagner Act, was made by the hearing officer in every representation case. S. Rep. No. 105, 80th Cong., 1st Sess., p. 25, reprinted in Vol. 1, Legislative History of the Labor Management Relations Act, 1947 (G. P. O., 1948) p. 431[3] (hereafter referred to as "L. H."). Accordingly, this restriction does not preclude the hearing officer from making procedural rulings which are incidental and essential to his statutory duty of "presiding at the hearing." *Ibid.*

[18] As this Court has noted, a representation proceeding under the Act is "an 'investigation,' essentially informal, not adversary." *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 706.

as the Board may prescribe * * *." Pursuant to this provision, and as contemplated by the terms of Sections 4 (a) and 5, the Board has specifically delegated to the office of the General Counsel authority "to receive and process * * * all petitions filed pursuant to section 9," and to handle "all phases of the investigation through the conclusion of the hearing," reserving to the Board only those "matters involving decisional action after such hearing * * *."[19] The practice under the foregoing provisions has uniformly been that the actual investigative work and the conduct of the hearings in representation cases has been carried on by regional office employees.

The authority thus vested in the Board to delegate investigatory powers furnishes "reason to believe that Congress intended that the Board should also be authorized to delegate" its subpena power. For, the handling of subpena questions is a "necessary incident to the power to investigate and prosecute." *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 159 (C. A. 7).

The foregoing analysis is not impaired, we submit, by the fact that the Court in *Cudahy* declined to imply power to delegate from Section 4 (c) in the Fair Labor Standards Act which is the counterpart of Section 5 of the National Labor Relations Act, the Court viewing the former to be "no more than a definition of the geographical or territorial jurisdiction

[19] Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board (Effective April 1, 1955), 20 Fed. Reg. 2175, April 6, 1955.

of the Administrator and his representatives" (315 U. S. at 360). The provision in *Cudahy* read (52 Stat. 1062, 29 U. S. C. 204 (c)):

> [4(c)] The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

In this context the Court read "his powers" to refer to the respective power of the Administrator or his representative otherwise conferred by the statute, and not to authorize the latter to exercise the former's power. Section 5 of the National Labor Relations Act, on the other hand, defines the geographical jurisdiction of the Board in a sentence separate from that which authorizes the Board to use agents to prosecute inquiries necessary to its functions, *supra*, pp. 28–29. Moreover, Section 4 (c) of the Fair Labor Standards Act could not be read as a grant of delegation authority without assuming, as the Court observed, that the Administrator's power of delegation was "without limitation," because the Section includes "any or all of his powers" without qualification. (315 U. S. at 361). Section 5 of the National Labor Relations Act, however, does not lend itself to such an unrestricted meaning. The sentence which allows the Board to designate agents pertains to prosecutory and investigatory functions, thereby excepting the Board's final adjudicative functions. In thus confining the authority to delegate, Section 5 of the National Labor Relations Act provides the very "legislative guide for determining which [functions] may and which may not be delegated," the absence of which led the Court in *Cudahy* to conclude that Section 4 (c) of the

Fair Labor Standards Act did not constitute a grant of authority to delegate.

Nor is the inference concerning delegability of the subpena power which we have drawn from Section 5 and the other provisions of the National Labor Relations Act described above affected by the further circumstance that Section 11 (1), like the comparable provisions in *Cudahy* (see n. 26, *infra*), appears to draw a distinction between the subpena power and the power to copy evidence, mentioning the Board alone in connection with the former and specifying the Board or its agents in connection with the latter. The court below thought that these "carefully worded * * * gradations in authority" ruled out any implied authority in the Board to delegate the subpena power (R. 162). But, reliance on this circumstance proves too much. An examination of the Act as a whole reveals that Congress has consistently used the term "Board" alone even though it is apparent that the function could only be exercised through subordinates. For example, Section 9 (c) (1) states with reference to representation petitions that "the Board shall investigate such petition." Section 9 (e) (1) provides that "the Board shall take a secret ballot of the employees" to determine whether the authority to make a union security agreement should be rescinded. In Section 10 (k) "the Board is empowered and directed to hear" jurisdictional disputes giving rise to allegations of Section 8 (b) (4) (D) allegations. Section 10 (j) states that "[t]he Board shall have power" to petition the federal district courts for temporary relief in unfair labor practice cases. And Section 11 (2) pro-

vides that a subpena enforcement proceeding may be instituted "upon application by the Board." In all these situations, the Board nevertheless exercises its statutory functions through subordinate officials, as, indeed, it must if it is to meet its statutory responsibilities (see *infra*, pp. 35–41), and we do not think that the Board's practice can seriously be questioned.[28] If the word "Board" alone does not have a limiting effect in these cases, there is no reason why it should have that effect in Section 11 (1).

In contrast to the Court of Appeals' overly literal reading of the section, which is also negated by the further considerations set forth pp. 34–50, *infra*, we believe a more accurate guide in determining Congressional intent respecting agency authority to delegate the subpena powers, no less than other powers, is the established principle that declaration of explicit statutory purposes carries with it, by necessary implication, authority in the administering body to fashion "the necessary means to accomplish those objects." *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 259. See also *National Labor Relations Board* v. *John S. Barnes Corp.*, *supra*, p. 30; 3 Sutherland, *Statutory Construction* (3d ed., 1943) § 5402; *McCulloch* v. *Maryland*, 4 Wheat. 316, 404–411. Under this principle, the delegation to regional officials of authority to handle all phases of representation cases through the hearing

[28] See *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 159 (C. A. 7); *Penello* v. *International Union, etc.*, 88 F. Supp. 935, 937 (D. D. C.); *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 886–889 (S. D. Ind.); *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895, 898–899 (S. D. N. Y.).

stage, which we have shown to be specifically allowed by the statute, also presupposes a delegation to these officials of power to determine the propriety of subpenas issued in such cases as an incidental and necessary part of the main function of conducting representation investigations.

2. *The procedures adopted are a valid exercise of the Board's rule-making power*

In addition, here as in *Mohawk*, the National Labor Relations Act confers broad rule-making power upon the Board. One of the factors which prompted the Court in *Mohawk* to imply authority to delegate was the existence in the Emergency Price Control Act of a provision which permitted the Administrator to "issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act" (331 U. S. at 121). Pointing out that the Fair Labor Standards Act "granted no broad rule-making power," the Court added (*ibid.*):

> Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld.[21]
>
> * * *

The National Labor Relations Act contains a rule-making provision equally as broad as that in Emergency Price Control Act. Section 6 of the National Labor Relations Act reads:

> The Board shall have authority from time to time to make, amend, and rescind, in the man-

[21] See also, *Jay* v. *Boyd*, 351 U. S. 345, 351, n. 8.

ner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

And, as in the Emergency Price Control Act, there is no provision in the National Labor Relations Act "negativing the existence of * * * authority [to delegate subpena powers]" (331 U. S. at 121). On the contrary, all other relevant considerations suggest the appropriateness of utilizing this rule making power to provide for such a delegation. For reasons given *supra*, pp. 28–34, since the statute expressly permits the Board to designate subordinate officials to handle representation investigations, it would follow that an agency regulation granting to such officials subpena powers, which are incidental to conducting those investigations, is a proper use of authority to make "such rules * * * as may be necessary to carry out the provisions of [the] Act." And as we show *infra*, pp. 35–50, both considerations of practicality and the legislative history of the 1947 amendments to the Act confirm the propriety and reasonableness of this use of the rule making power. On this score, it is plain that the instant case is controlled by the decision in *Mohawk*, rather than that in *Cudahy*. See *National Labor Relations Board* v. *Lewis*, decided October 29, 1957, 41 LRRM 2078, 2081 (C. A. 9).

3. *The power to permit subordinates to pass, in the first instance, on petitions to revoke subpenas is essential to an orderly and efficient exercise of the Board's functions*

Here, as in *Mohawk*, practical administrative considerations "reinforce the construction of the Act

which allows * * * authority to delegate * * * subpoena power" (331 U. S. at 123). During the fiscal year ending June 30, 1956, the Board closed 8,070 representation cases and 5,619 unfair labor practice cases, issuing formal decisions in 1,751 of the representation cases and 400 of the unfair labor practice cases.[22] During a comparable period, a total of 855 subpenas were issued in representation cases, of which 218 were subpenas *duces tecum,* and the number issued in unfair labor practice cases was approximately as large.[23] Under the present procedure, the Board is required to interrupt its main decisional process for a consideration of subpena questions in only a handful of cases, for, as we have noted *supra* at p. 22, the parties are generally satisfied with the rulings of hearing officials on petitions to revoke and thus do not undertake a "special appeal" to the Board. If, however, the Board were precluded from utilizing this procedure, every petition would have to go directly to the Board, without the benefit of any preliminary screening by the hearing official. This would absorb time which the Board, already having a substantial case backlog,[24] could more profit-

[22] Twenty-first Annual Report of the National Labor Relations Board (Gov't Print. Off., 1957), pp. 163, 165. The fiscal year ending June 30, 1956 is the most recent period for which published figures are available.

[23] The statistics as to subpena activity are compiled from the files and records maintained by the Regional Offices of the Board and by the Board's trial examiners.

[24] At the close of the fiscal year ending June 30, 1956, there was a backlog of 1,444 representation cases and 2,318 unfair labor practice cases pending before the Board. Twenty-first Annual Report, *op cit.*, p. 163. Cf. *Guss* v. *Utah Labor Board*, 353 U. S. 1, 11–12.

ably spend on other matters. As the Seventh Circuit pointed out in *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160: If "the Board must then, as a Board, pass upon every petition for the revocation of any subpoena, it would be physically impossible for the Board and its members to perform the many other more important duties which they are required to perform to accomplish the purpose of the Act." See also, *National Labor Relations Board* v. *Lewis*, decided October 29, 1957, 41 LRRM 2078, 2081; cf. Final Report of Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941), p. 21.

Moreover, hearings under the Act are conducted throughout the United States and its Territories. To require the Board to pass, in the first instance, on every petition to revoke would interrupt and delay the hearing before the hearing officer, for where, as is usually the case, the subpena pertains to the central issue in the proceedings, there would be no alternative but to adjourn the hearing for a period of at least several days to permit the preparation and submission of a petition to the Board in Washington, and obtain its ruling thereon. A delay of this nature is particularly serious in representation cases which constitute the bulk of the Board's caseload. As Congress has emphasized: "When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees * * * the union, unless an election can promptly be held to determine the choice of repre-

sentation, runs the risk of impairment of strength by attrition and delay while the case is dragging on * * * or else is forced to call a strike to achieve recognition by its own economic power." [25]

The foregoing demonstrates, we believe, the error of the conclusion of the court below that deprivation of the use of subordinate officials in the discharge of the Board's subpena powers "should not * * * prove unduly burdensome to the Board" (R. 163). And the further suggestion of the court below that in any event the remedy for an unworkable procedure "lies with Congress, not with the courts" (*ibid.*), misconceives the practical consequences of its holding. We do not seek a judicial cure for a legislative deficiency, but merely invoke the traditional rule, relied upon by this Court in *Mohawk,* that a statute will not be construed to make it administratively unworkable if another construction is reasonably possible. See also, *United States* v. *Fisher;* 2 Cranch 358, 385.

Nor may the difficulties emanating from the holding below be alleviated, as the Fifth Circuit suggested (R. 163), by using, in lieu of subpenas, "the right to copy any evidence of any person being investigated," which power, under the express language of Section 11 (1) of the Act, may be exercised by the "Board, or its duly authorized agents or agencies" (p. 58, *infra*). As this Court stated in *Cudahy* vis-à-vis a provision of the Fair Labor Standards Act granting the right to copy evidence, in terms comparable to that of Section 11 (1) of the National Labor Rela-

[25] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 7.

tions Act,[26] such right, as distinguished from the right to subpena, "is, in effect, a power of inspection at the employer's place of business *to be exercised only on his consent*" (315 U. S. at 364). (Emphasis added.) Since the Board generally, as in this case (*supra*, p. 3), utilizes subpenas only when the respondent has failed to make the required information available voluntarily, it is clear that the Board's power to copy evidence is not a satisfactory substitute for the subpena power.

Moreover even if employer consent were not a prerequisite to inspection, the National Labor Relations Act, like the Fair Labor Standards Act, does not appear to contain any grant of authority for enforcement of the provisions relating to inspection and the copying of evidence. See Section 11 (2) of the former Act, which provides only for enforcement of subpenas. Absent explicit statutory authority, it is

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[26] Section 11 (a) of the Fair Labor Standards Act (29 U. S. C. 211 (a)) provides in applicable part: "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

The relevant part of Section 11 (1) of the National Labor Relations Act reads: "The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. * * *"

doubtful whether the Board would have standing to invoke the aid of a federal court in making the inspection provisions of the Act effective against recalcitrant parties. *Knapp* v. *Lake Shore Railway Co.*, 197 U. S. 536; *Cudahy Packing Co.* v. *United States*, 15 F. 2d 133, 134 (C. A. 7); compare *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 304.

In conclusion, it should be noted that the recognition given consideration of practical administration in *Mohawk* is in full accordance with settled authority that a government officer or agency upon whom a statutory duty is conferred need not perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense * * * expected to perform. This cannot be * * * for the * * * reason that it is impracticable—nay, impossible." *Williams* v. *United States*, 1 How. 290, 297. See also, *Miller* v. *Mayor of New York*, 109 U. S. 385, 394; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 206; *United States ex rel. French* v. *Weeks*, 259 U. S. 326, 333; *United States* v. *Vivian*, 224 F. 2d 53, 56 (C. A. 7), certiorari denied, 350 U. S. 953; *Papayianakis* v. *The Samos*, 186 F. 2d 257, 259–260 (C. A. 4), certiorari denied, 341 U. S. 921; *Plapao Laboratories, Inc.* v. *Farley*, 92 F. 2d 228, 229 (C. A. D. C.), certiorari denied, 302 U. S. 732; *Lloyd Royal Belge Societe Anonyme* v. *Elting*, 61 F. 2d 745 (C. A. 2), certiorari denied, 289 U. S. 730; *United States* v. *Bareno*, 50 F. Supp. 520, 527 (D. Md.). See also the authorities cited *supra*, p. 33. There is every reason for applying this principle here. Not only do cogent considera-

tions respecting the efficient administration of the Act support the implication of authority to delegate the subpena power, but the reservation by the Board of the right to review rulings made by subordinate officials affords a safeguard against the exercise of that power in a manner that does not conform to Board policy.[27]

4. *Legislative ratification of the Board interpretation*

To the extent that the legislative history of Section 11 (1) of the amended Act throws light on Congressional intent respecting the delegability of the Board's subpena power, it too indicates, as did the relevant history in *Mohawk* (331 U. S. at 120–121), that utilization of subordinate officials was contemplated.

Section 11 (1) of the Wagner Act defined the Board's subpena power in the following terms:

> Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its members, agent, or agency conducting the hearing or investigation. * * *

[27] For this reason there is no occasion here, as there was in *Cudahy*, to weigh against the implication of authority to delegate the subpena power the fact that this power is "capable of oppressive use, especially when it may be indiscriminately delegated * * *" (315 U. S. at 363). See also the opinion of the court below (R. 163). It is precisely to guard against any danger of misuse of the subpena power that the opportunity for Board review is made available. See pp. 22–23, *supra*.

Thus, it vested the decisional authority to rule on the validity of subpenas in the Board itself in terms no less equivocal than found in the amended Act. The single difference was that the exercise of that authority was keyed to the issuance of the subpena rather than to the filing of a petition to revoke.[28] Early in the administration of the Wagner Act, however, the Board provided in its Rules and Regulations that initial rulings as to the propriety of subpenas should be made by subordinate officials, including the hearing officer where, as here, the subpena was applied for after the hearing had opened.[29] Provision was also made for special appeals to be taken to the Board, just as in Section 102.57 (c) of the current Rules and Regulations, where a party

[28] The considerations which underlay a decision to issue or not issue a subpena under the Wagner Act are described in the Monograph on the Board of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., pp. 18–19. See also, *The Sorg Paper Co.*, 8 N. L. R. B. 657, 658, n. 1; *The Solvay Process Co.*, 47 N. L. R. B. 1113, 1115, n. 4; *Inland Container Corp.*, 66 N. L. R. B. 607, 609, n. 2.

[29] Article II, Sec. 21 and Article III, Sec. 4, Rules and Regulations, Series 2, effective July 14, 1939. Similar provisions were retained in each of the changes made in the Rules and Regulations under the Wagner Act. See Article II, Section 21 and Article III, Section 4, Rules and Regulations, Series 2, as amended, effective March 13, 1940; *Id.*, Series 2, as amended, effective April 22, 1941; *Id.*, Series 2, effective September 6, 1941; Article II, Section 21 and Article III, Section 5, Rules and Regulations, Series 2, as amended, effective October 28, 1942; *Id.*, Series 3, effective November 26, 1943; *Id.*, Series 3, as amended, effective July 12, 1944; Secs. 203.27 and 203.52 (c), Rules and Regulations, Series 4, effective September 11, 1944.

was aggrieved by a hearing officer's ruling.[30] Accordingly, for a period of many years under the Wagner Act the Board consistently and openly interpreted its subpena power to permit authorized subordinates to make initial rulings as to the propriety of subpenas, subject to Board review either upon special appeal, or upon transfer of the entire case to the Board in the ordinary course.[31]

As observed by the Seventh Circuit in *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 161, "Congress was fully aware of the construction the Board had placed on [Section 11 (1)] and the procedure the Board was following in issuing subpoenas" when the 1947 amendments were enacted. The Report of the Attorney General's Committee on

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[30] The most recent pre-amendment provision was contained in Section 203.51 (c) of the Rules and Regulations, Series 4, effective September 11, 1946. Similar provisions were included in Series 2 and 3, and the amendments thereto, of the Rules and Regulations.

[31] However, it may be noted that a Senate Committee Print stated of the subpena provision of S. 1958, which was subsequently enacted into law: "S. 1958 takes care to recite with great particularity who may issue subpenas * * *. As in the committee draft, the power to issue subpenas is limited to Board members." Memorandum of March 11, 1935, Comparing S. 1958 and S. 2926, Sen. Comm. Print, 74th Cong., 1st Sess., reprinted in Vol. I, Legislative History of the National Labor Relations Act, 1935 (G. P. O., 1949) p. 1367. Whatever bearing this statement may have on the correctness of the Board's interpretation of its subpena powers under the Wagner Act, it has no bearing on the issue here. For, as we show in the text, pp. 43–48, in 1947 Congress approved the Board's interpretation, irrespective of its correctness as an original matter, and continued it in effect under the present statute.

Administrative Procedure[32] and testimony of the Board's General Counsel in Congressional hearings,[33] as well as numerous decisions of the Courts of Appeals[34] and the Board,[35] all described the Board's practice in this respect with particularity. Moreover, in changing the structure of the Board's subpena power under the Wagner Act, Congress subjected the manner of its exercise to close scrutiny. The House proposed two substantive changes in the existing Board practice: (1) the elimination in unfair labor practice cases, but not in representation cases, of the use of subpenas prior to hearings, and (2) the requirement that subpenas be issued automatically upon application, with the right of a party upon whom a subpena *duces tecum* is served to file a petition to revoke.[36] Thus, Section

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[32] Final Report, S. Doc. No. 8, 77th Cong., 1st Sess. (1941), pp. 159–160, 423. See also, the Monograph on the Board of the Attorney General's Committee, S. Doc. No. 10, 77th Cong., 1st Sess. (1941), pp. 18–19.

[33] Hearings on S. 674, 675 and 918, before Subcommittee of Senate Committee on the Judiciary, 77th Cong., 1st Sess. (April 2–29, 1941), p. 278.

[34] See, *e. g.*, *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 80 (C. A. 3); *National Labor Relations Board* v. *Acme-Evans Co.*, 130 F. 2d 477, 479 (C. A. 7), certiorari denied, 318 U. S. 772; *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 46 (C. A. 3); *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757–758 (C. A. 2).

[35] See cases cited in n. 28, *supra;* see also, Fifth Annual Report of the Board (Gov't Print. Off., 1941), p. 11.

[36] The reasons for the second change are not particularized in the legislative history of the 1947 amendments to the Act. However, under the Wagner Act there had been criticism to the effect that private parties were issued subpenas in Board proceedings only upon a showing of relevancy of the evidence

11 (1) of the House bill read, in applicable part (H. R. 3020, 80th Cong., 1st Sess., pp. 44–45, Vol. 1, L. H. pp. 201–202):

> SEC. 11. For the purpose of any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation by the Administrator under section 9—
>
> (1) The Board, or any member thereof, or any trial examiner shall, upon application of the Administrator or any party to such proceedings, forthwith issue to the Administrator or to such party as the case may be, in the name of the Board, subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board or its duly authorized agent or agents to revoke, and the Board, or such agent or agents, shall revoke such subpena if in its, his, or their opinion, as

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sought to be adduced, whereas counsel for the Board were able to obtain subpenas without making such a showing. See *Inland Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 9, 18–19 (C. A. 7). It was to meet this criticism, which had also been made of the practice of other agencies, that Section 6 (c) of the Administrative Procedure Act (60 Stat. 240, 5 U. S. C. 1005 (c)) was passed with a view toward assuring "private parties the same access to subpenas as that available to the representatives of agencies." S. Rep. No. 752, 79th Cong., 1st Sess., 20; H. Rep. No. 1980, 79th Cong., 2d Sess., 33; 92 Cong. Rec. 5652, all reported in S. Doc. No. 248, 79th Cong., 2d Sess. at 206, 265, 363. See also Attorney General's Manual on the Administrative Procedure Act, p. 67 (1947).

> the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, his, or their opinion, as the case may be, such subpena does not describe with sufficient particularity the evidence whose production is required.

The Senate bill, on the other hand, carried over without change the Wagner Act language relating to subpenas.[37] As finally enacted, Section 11 (1) preserved only that part of the House bill which transformed the subpena procedure into a two-step operation; in other respects the Senate bill was followed. Thus, not only was the House bill language restricting the use of pre-hearing subpenas omitted, but also that which specifically referred to "trial examiner" and "duly authorized agent or agents" in connection with the issuance and revocation of subpenas. The House Conference Report gives the following explanation (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 58, Vol. 1, L. H. p. 562):

> The Senate amendment, in section 11, made no change in the provisions of existing law. The House bill, in section 11, made several changes in addition to those made necessary by the division of functions under the House bill between the Board on the one hand and the Administrator on the other. *First*, the subpena power in connection with investigations was limited to investigations under section 9. *Second*, it was required that upon application

[37] S. 1126, 80th Cong., 1st Sess., p. 35, Vol. 1, L. H. p. 133. See also, S. Rep. No. 105, 80th Cong., 1st Sess., p. 27, Vol. 1, L. H. p. 433.

> of any party, subpenas be issued to him as a matter of course, and a procedure was established whereby a person subpenaed could move to quash the subpena if the evidence covered thereby did not relate to any matter under investigation or in question or if it did not describe with sufficient particularity the evidence whose production was required. * * *.
>
> The conference agreement *follows the provisions of existing law* and the Senate amendment with the addition thereto of provisions requiring the issuance of subpenas as a matter of course on the request of any party, as was provided in the House bill. [Emphasis added.]

In the only other significant Congressional commentary respecting the change made in Section 11 (1), Senator Taft also emphasized that the amendment was intended to alter existing law only insofar as it required automatic issuance of subpenas, and postponed rulings as to their validity to the filing of a petition to revoke. As stated by Senator Taft (93 Cong. Rec. 6445, Vol. 2, L. H. p. 1543):

> Section 11 authorizes the Board to conduct hearings and investigations and to subpena witnesses. This section was not changed in the Senate amendment and was modified by the conferees in *only one respect*. The Board is required upon application of any party to issue a subpena as a matter of course. A procedure is established whereby the person subpenaed may move to quash the subpena if the evidence requested thereby does not relate to any matter under investigation or does not describe with sufficient particularity the evidence required. [Emphasis added.]

The foregoing statements from the House Conference Report and Senator Taft's analysis both emphasize that, except for instituting a two-step procedure for handling subpenas, no change was intended in the law as administered by the Board under the Wagner Act. This fact, we submit, overrides the significance of the deletion by the conferees of the language of the House bill which expressly permitted agents of the Board to act with respect to requests for and petitions to revoke subpenas. In so contending, we are aware that Congressional deletion of proposals may reasonably give rise to an inference that such action represented a rejection of the intended effect of the proposed language. Cf. *Cudahy*, 315 U. S. at 362–363, n. 3. However, in the face of the important evidence, referred to above, of an intent to continue, except for one modification, the existing procedure, under which the authority proposed by the deleted language had been implied, no such inference is required here.

It may be, as the Ninth Circuit speculated in concluding that the rejection of the House bill language expressly permitting delegation by the Board of subpena powers was "not persuasive" of an intent to disallow such delegation, that the "revison was made because it was felt that the added language was superfluous." *National Labor Relations Board* v. *Lewis*, decided October 29, 1957, 41 LRRM 2078, 2081, n. 4. Or, perhaps the explanation lies in the fact that numerous other powers are given by the Act to the Board without express authority to delegate, although such delegation is necessary to make the Act workable

(*supra*, pp. 32–33), and that the conferees thought it unwise to specify a power of delegation respecting subpenas "lest the specification be taken as exhaustive." Judge Learned Hand, concurring in *Guiseppi* v. *Walling*, 144 F. 2d 608, 624 (C. A. 2), affirmed *sub nom. Gemsco, Inc.* v. *Walling*, 324 U. S. 244. Whatever the explanation, this much is clear: the Senate version of Section 11 (1), which was meant to make "no change * * * in existing law" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 27, Vol. 1, L. H. p. 433), was adopted except for the addition of only that part of the House bill language necessary to require automatic issuance of subpenas, and to postpone rulings as to their validity until a petition to revoke was filed. Significantly, at no stage of the legislative consideration of the 1947 amendments was there any criticism of the Board's practice of entrusting its agents to make initial rulings as to the validity of subpenas. We believe the most reasonable conclusion to be drawn from this legislative background, therefore, is that Congress approved the Board's interpretation of Section 11 (1) of the Wagner Act, and modified the Board's long standing practice only to the extent of changing the stage at which rulings were to be made, deferring such rulings from the issuance to the petition to revoke stage. As summarized by the Seventh Circuit (*National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 161):

> * * * Congress was fully aware of the construction the Board had placed on this section and the procedure the Board was following in issuing subpoenas. If Congress had not agreed with the Board's construction and the pro-

> cedure being followed, the subpoena provisions could have been further amended to expressly prohibit the delegation of the subpoena power by the Board. Failure of the Congress, under these circumstances, to expressly forbid the delegation of subpoena power when amending Section 11 (1), must be considered as legislative ratification of the Board's construction and procedure. * * *.

Cf. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 44; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365–366; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; *Brooks* v. *Dewar*, 313 U. S. 354, 361.

II

THE FAILURE OF RESPONDENTS TO EXHAUST THEIR ADMINISTRATIVE REMEDY OF A SPECIAL APPEAL TO THE BOARD, PURSUANT TO REGULATIONS SHOWN TO BE VALID, REQUIRES SUMMARY ENFORCEMENT OF THE SUBPENAS

In their answers to the enforcement proceedings in the District Court, respondents raised several defenses in addition to contending that the Board's hearing officer was not authorized to make the initial ruling on their petitions to revoke the subpenas in this case (R. 50–52, 73–76, 96–99, 121–124). With the exception of the latter contention, and the assertion that the subpenas were oppressive and burdensome, respondents' defenses either were not pressed in the court below or were rejected by it (R. 161, 164–166),[38]

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[38] The court below did not pass on respondents' "oppressive" contention, but noted in its opinion that "courts can usually remove the oppression or burden without quashing the entire

The Board itself, however, has not had occasion to consider whether there was any substance to respondents' various defenses, for as we have shown, no attempt was made to take an appeal to the Board from the hearing officer's denial of respondents' petitions to revoke the subpenas.

We have shown that the Board's Rules and Regulations are valid and proper under the Act in providing that subpena questions are, in the first instance, to be resolved by a hearing officer or other Board official, subject to Board review by special appeal where appropriate. Such an appeal in this case provided an avenue for a full Board determination of the merits of respondents' defenses in advance of judicial consideration of the same defenses in the subpena enforcement proceedings which ensued. *Supra*, pp. 18–20. In these circumstances, by failing to avail themselves of the special appeal provisions, respondents did not exhaust their administrative remedies before submitting their position to the District Court review. Under settled authority, by not seeking Board determination of their defenses, respondents were barred from asserting them in the enforcement suit. See,

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subpena" (R. 164, n. 8). Cf. *Winn & Lovett Grocery Co.* v. *National Labor Relations Board*, 213 F. 2d 785, where the same court rejected a similar contention on the ground that the subpena in that case, just as here (*supra*, p. 4), permitted the submission of a statement of the desired information in lieu of production of the necessary books and records. In connection with the subpena *ad testificandum*, the court below rejected respondents' contention that the Regional Director was not a "party" entitled to request the issuance of subpenas (R. 164–166).

e. g., Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U. S. 752, 767–768; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–52; *United States* v. *Sing Tuck*, 194 U. S. 161, 167–168.[39]

The requirement that respondents exhaust their administrative remedy before presenting their contentions to a court is not affected by that part of Section 10 (c) of the Administrative Procedure Act which provides that "agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application * * * (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."[40] Even putting aside the question of

[39] It is of no moment in applying the doctrine of exhaustion of administrative remedies that judicial review of agency action results from a suit by the agency rather than by the private party who failed to exhaust his remedy before the agency. *Reconstruction Finance Corporation* v. *Lightsey*, 185 F. 2d 167 (C. A. 4); cf. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499.

[40] The entire subsection reads as follows (60 Stat. 243, 5 U. S. C. 1009 (c):

> Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

whether the denial of a petition to revoke a subpena—a ruling made preliminary to any decision on the merits of the case—is "otherwise final" and therefore not within the express exception to the foregoing language,[41] we read this language as covering only "final agency action for which there is no other adequate remedy in any court" (n. 40, *supra*). The evident object of the last sentence of Section 10 (c) is to specify the circumstances under which agency action shall be considered final for purposes of qualifying for judicial review under Section 10 (c) where such review is otherwise not available. Cf. H. Rep. No. 1980, 79th Cong., 2d Sess., p. 42. Where, as here, there is express statutory provision for judicial review irrespective of whether the agency action is final in the conventional sense (Section 11 (2) of the National Labor Relations Act), Section 10 (c) would seem to serve no function. Here, the availability of court review is unquestioned, and there is no reason for not determining the stage of that review by the traditional rules of exhaustion of administrative remedies. The reading we thus give to Section 10 (c) of the Administrative Procedure Act is in full harmony with this Court's observation that this statute "purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review." *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499–500.

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[41] Compare *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384–385 with *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545–546.

In sum, respondents have failed to invoke the procedure which is specially designed to afford the Board opportunity to examine their contentions. Accordingly, there was no opportunity for Board review of the defenses which respondents made in court, a situation which it is the object of the exhaustion doctrine to avoid. Cf. *Levers* v. *Anderson*, 326 U. S. 219, 222. See cases cited *supra*, p. 52. Proper application of the doctrine in this case therefore requires that the case be remanded to the district court with directions to enforce the subpenas forthwith.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case remanded to the district court with directions to enforce the subpenas forthwith.

Respectfully submitted.

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DECEMBER 1957.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

NATIONAL LABOR RELATIONS BOARD

* * * * *

SEC. 3. * * *

* * * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

SEC. 4. (a) * * * The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. * * *

* * * * *

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies

as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * *

REPRESENTATIVES AND ELECTIONS

* * * * *

SEC. 9. (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(e) (1) [As amended, 65 Stat. 601, 29 U. S. C. 159 (e) (1)] Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take

a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

* * * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. * * *

* * * * *

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue

to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

The relevant provisions of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are as follows:

SUBPART B—PROCEDURE UNDER SECTION 10(A) TO (I) OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

SEC. 102.26. *Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal.*—All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 102.31. Unless expressly authorized by the rules and regulations, rulings by the regional director and by the trial examiner on motions, by the trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Board, pursuant to section 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party

shall immediately serve a copy thereof on each other party.

* * * * *

SEC. 102.31 *Issuance of subpenas; petitions to revoke subpenas; right to inspect or copy data.*—(a) Any member of the Board shall, on the written application of any party, forthwith issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpenas filed during the hearing shall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application, on behalf of any member of the Board. Applications for subpenas may be made *ex parte*. The subpena shall show on its face the name and address of the party at whose request the subpena was issued.

(b) Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena upon him, petition in writing to revoke the subpena. All petitions to revoke subpenas shall be served upon the party at whose request the subpena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any

matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The trial examiner or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the official record except upon the request of the party aggrieved by the ruling.

* * * * * *

SEC. 102.57 * * *

* * * * *

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.58 (e). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record. Requests to the Board for special permission to appeal from such rulings of the regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

* * * * * *

SUBPART C—PROCEDURE UNDER SECTION 9 (C) OF THE ACT FOR THE DETERMINATION OF QUESTIONS CONCERNING REPRESENTATION OF EMPLOYEES

* * * * * *

SEC. 102.58 * * *

* * * * *

(c) Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing

officer if made at the hearing. Applications for subpenas may be made *ex parte*. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

* * * * * * *

SEC. 102.59 *Record; what constitutes; transmission to Board.*—Upon the close of the hearing the regional director shall forward to the Board in Washington, D. C., the petition, notice

of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 102.60 *Proceedings before the Board; further hearings; briefs; Board direction of election; certification of results.*—The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to direct a secret ballot of the employees or to make other disposition of the matter. * * *

APPENDIX B

United States of America

Before the National Labor Relations Board

AVIS FORD, INC.	Cases Nos. 7–RC–2487	
GIB BERGSTROM, INC.	7–RC–2488	
MIDWAY MOTORS, INC.	7–RC–2489	
RUSS DAWSON, INC.	7–RC–2490	
GILBERT MOTOR SALES, INC.	7–RC–2491	
HETTCHE MOTOR SALES CO.	7–RC–2492	Consolidated
HOLZBAUGH MOTOR SALES, INC.	7–RC–2493	
JOHNS BROTHERS, INC.	7–RC–2494	
HOWARD LARE, INC.	7–RC–2495	
AL LONG, INC.	7–RC–2496	
STUART WILSON, INC.	7–RC–2497	
BELLING-MCHUGH, INC.	7–RC–2513	
WALKER MOTORS, INC.	7–RC–2436	
GROVES BUICK, INC.	7–RC–2502	Consolidated
MCGUIRE MOTOR COMPANY	7–RC–2503	
FLOYD RICE SALES & SERVICE, INC.	7–RC–2562	

EMPLOYERS

and

LOCAL 376, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., PETITIONER

ORDER

The Board, upon consideration of the several petitions by the Employers in these cases appealing the Hearing Officer's denial of the Employer's petitions to revoke subpenas, orders that the appeals be, and they hereby are, denied because there has been no showing that the information sought to be elicited

by the subpenas is not relevant to the matter under investigation.

Dated, Washington, D. C., November 5, 1954.

By direction of the Board.

OGDEN W. FIELDS,
Associate Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 4–RC–2198

In the Matter of

MITTLEMAN, BERNSTEIN & CO., EMPLOYER

and

LOCAL NO. 228, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL, PETITIONER

ORDER DENYING APPEAL

On December 24, 1953, counsel for Local No. 228, International Ladies' Garment Workers' Union, AFL, Petitioner herein, filed an appeal from the ruling of the Hearing Officer revoking Subpoena Duces Tecum and requested the Board to reverse the Hearing Officer and reinstate said Subpoena Duces Tecum. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the said appeal be, and it hereby is, denied.

Dated, Washington, D. C., December 29, 1953.

By direction of the Board:

OGDEN W. FIELDS,
Associate Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 1-CA-1085

In the Matter of

MOUNT HOPE FINISHING COMPANY, MOUNT HOPE FINISHING COMPANY, INC., JOSEPH K. MILLIKEN, FRANK L. DAYLOR AND ROBERT D. MILLIKEN

and

TEXTILE WORKERS UNION OF AMERICA, CIO

ORDER DENYING REQUESTS

Counsel for Mount Hope Finishing Company, Inc., one of the Respondents in the above-entitled matter, having requested special permission to appeal directly to the Board from the ruling of the Trial Examiner on a Motion and Petition to sever and continue the said proceeding against this Respondent to the Fifth Region, and to revoke subpenas *duces tecum* heretofore issued, having requested oral argument thereon, and the Board having duly considered the matter,

IT IS HEREBY ORDERED that the aforesaid Respondent's request for permission to appeal from the Trial Examiner's rulings, and its request for oral argument be, and they hereby are, denied.

Dated, Washington, D. C., June 6, 1952.

By direction of the Board:

LOUIS R. BECKER,
Executive Secretary.

Case No. 6–RC–694

SA-MOR QUALITY BRASS, INC., EMPLOYER

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE U. S. AND CANADA, LOCAL NO. 152, AFL, PETITIONER

Case No. 6–RC–695

STERLING FAUCET COMPANY, EMPLOYER

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE U. S. AND CANADA, LOCAL NO. 152, AFL, PETITIONER

ORDER DENYING APPEAL

Counsel for Sterling Faucet Company and Sa-Mor Quality Brass, Inc., Respondents herein, having requested special permission to appeal directly to the Board from the rulings of the Trial Examiner revoking the Subpoenas numbers A–54676, B–22180, and B–10299 previously issued by the said Trial Examiner, and the Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondents' request for special permission to appeal from the Trial Examiner's rulings be, and it hereby is, denied. This denial however, is without prejudice to the right of the Respondents again to present the issue to the Board pursuant to provisions of the Rules and Regulations subsequent to issuance of an Intermediate Report by the Trial Examiner.

Dated, Washington, D. C., March 11, 1952.

By direction of the Board:

LOUIS R. BECKER,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Cases Nos. 10-CA-2692 and 10-CA-2781

TRADE WINDS COMPANY, INC.

and

AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS

ORDER

Counsel for George H. McGee having requested special permission to appeal directly to the Board from a ruling of the Trial Examiner denying said McGee's motion to quash a subpena *duces tecum* served upon him by Respondent Trade Winds Company, Inc.; the Board having granted said McGee's special permission to appeal; and the Board having considered the matter upon said appeal,

IT IS HEREBY ORDERED that the ruling of the Trial Examiner denying said motion to quash be, and it hereby is, reversed, and said subpena hereby is revoked, on the ground that an insufficient showing has been made that the documents elicited by said subpena are material or relevant at this time. This order is without prejudice to a renewal of the application for such subpena at some subsequent stage of the hearing before the Trial Examiner upon an affirmative showing of the necessity therefor.

Dated, Washington, D. C., February 19, 1957.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 1-CA-1288

In the Matter of

NEW BRITAIN MACHINE COMPANY

and

LODGE 1021 INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

ORDER

Counsel for Connecticut State Board of Mediation and Arbitration having filed for special permission to appeal directly to the Board from certain rulings of the Trial Examiner, and a brief in support thereof, and the Board having duly considered the matter,

IT IS HEREBY ORDERED that the special permission to appeal be, and it hereby is, granted; and

IT IS FURTHER ORDERED that the ruling of the Trial Examiner denying the Connecticut State Board of Mediation and Arbitration's motion to quash the subpoena served upon that Board's Chairman, be, and it hereby is, reversed; and

IT IS FURTHER ORDERED that the said subpoena be, and it hereby is, *quashed*.

Dated, Washington, D. C., January 30, 1953.

By direction of the Board:

OGDEN W. FIELDS,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 5-CA-467

In the Matter of

DAVID GOETZ, D/B/A FEDERAL SILK MILLS

and

TEXTILE WORKERS UNION OF AMERICA, CIO

ORDER

Counsel for Maryland Employment Security Board having requested special permission to appeal directly to the Board from a ruling of the Trial Examiner denying a Petition to revoke the subpoena duces tecum requiring the appearance of Edward A. Smith, a Referee employed by the Employment Security Board of Maryland, to testify in the above-entitled proceeding and to produce a transcript of certain testimony, and the Board having duly considered the matter,

IT IS HEREBY ORDERED that the special permission to appeal be, and it hereby is, granted, and that such appeal be filed with the Board in Washington, D. C., on or before March 24, 1952, with affidavit of due service of copies upon the parties to this proceeding. The parties to this proceeding may file a reply thereto, which reply must be received by the Board in Washington, D. C., on or before April 4, 1952, and must be accompanied by an affidavit of due service of copies upon the parties to this proceeding.

Dated, Washington, D. C., March 13, 1952.

By the direction of the Board:

LOUIS R. BECKER,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 5–SA–467

In the Matter of

DAVID GOETZ, D/B/A FEDERAL SILK MILLS

and

TEXTILE WORKERS UNION OF AMERICA, CIO

RULING ON APPEAL

The Board, pursuant to Section 102.26 of its Rules and Regulations, having heretofore granted permission to the Maryland Employment Security Board to appeal directly to it from a ruling of the Trial Examiner denying a Petition to revoke the *subpoena duces tecum* requiring the appearance of Edward A. Smith, a Referee employed by the said Maryland Board;

Now therefore, upon a consideration of the appeal filed on March 19, 1952, by the Maryland Employment Security Board, the Board is of the opinion that the appeal is merited and hereby grants the appeal to revoke the said *subpoena duces tecum,* and the ruling of the Trial Examiner of January 11, 1952, is hereby reversed.

Dated, Washington, D. C., April 22, 1952.

By direction of the Board:

LOUIS R. BECKER,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 2-RC-1792

In the Matter of

PHELPS DODGE COPPER PRODUCTS CORPORATION,
EMPLOYER

and

LOCAL 441, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, C. I. O., PETITIONER

ORDER

The Phelps Dodge Copper Products Corporation and Mr. W. J. Palmer, of the Company, having requested special permission to appeal to the Board from a ruling of the Hearing Officer denying a petition to revoke subpoenas Numbers A-38861 and B-13383; opposition to the request having been filed by United Electrical, Radio and Machine Workers of America, and the Board having considered the matter,

IT IS HEREBY ORDERED that the request for leave to appeal be, and it hereby is, granted, and

IT IS FURTHER ORDERED that the ruling of the Hearing Officer be, and it hereby is, reversed, as it appears to the Board that the evidence whose production is required by the subpoenas is not relevant to the matter in question in this proceeding. Accordingly, the petition to revoke the subpoenas is granted.

Dated, Washington, D. C., February 16, 1950.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1987

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JAN 31 1958
JOHN T. FEY, Clerk.

No. 234

In the Supreme Court of the United States
October Term, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY, JENKINS AND SONS, INC., JENKINS JEWELRY COMPANY, AND OLIVER A. JENKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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Jacksonville, Fla.
Attorneys for Respondents

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The opinion of the court below, The Court of Appeals for the Fifth Circuit (R. 160-166), is reported at 243 F. 2d 427. The opinion of the District Court (R. 152-155) is reported at 141 F. Supp. 860.

In the Supreme Court of the United States
October Term, 1957

No. 234

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY, JENKINS AND SONS, INC., JENKINS JEWELRY COMPANY, AND OLIVER A. JENKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

Section 11 (1) of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. 151 et seq.) (herein called the Act) provides in part:

> "The Board, or its duly authorized agents or agencies shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings,

forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required."

The National Labor Relations Board (herein called the Board) has promulgated administrative regulations providing in part (Section 102.58 (c), Rules and Regulations, 29 U.S.C. Appendix 468):

> "Any person subpenaed, it he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. * * * The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director, or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. * * *"

This case involves a "representation" case heard before a "hearing officer" as distinguished from an "unfair labor

practice" case heard before a "trial examiner". Hearing officers have limited authority, the statute providing that hearing officers may not make recommendations with respect to the issues in a representation case. Under Board practice hearing officers make no decision or recommendations as to motions to dismiss petitions or the other "questions of representation" in issue and he is merely charged with the duty of preparing a record upon which the Board itself makes a decision.

The Board has provided in its Rules and Regulations (Section 102.57 (c)):

> "Unless expressly authorized by these rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record."

This case was originally presented to the United States District Court for the Southern District of Florida on petitions by the Board for enforcement of one ad testificandum and several duces tecum subpoenas issued by the Board. The District Court entered an order. (R. 152-155) quashing the subpoenas on the grounds they were "unreasonable, burdensome and oppressive" and were not issued according to law in that they were not issued upon application of a "party" to the proceedings before the Board.

The Board appealed to the United States Court of Appeals for the Fifth Circuit which rendered an opinion (R. 160-166) holding that the Act contained no provision for a petition to revoke an ad testificandum subpoena; that the Act did not empower the Board to delegate to hearing officers in representation cases the power to rule upon pe-

titions to revoke subpoenas; that only the Board could rule upon such petitions to revoke; that the Board's jurisdiction in this respect is original and not appellate and that Respondents were not required to request "special permission of the Board" to appeal; and that the applications for the subpoenas were properly made by a "party" to the proceeding. The District Court was held in error in declining to enforce the subpoena ad testificandum and in not declining to rule upon the duces tecum subpoenas.

The questions presented therefore are:

1. Does a hearing officer in a Board representation case have power or jurisdiction to rule upon petitions to revoke subpoenas?

2. Were petitions by Board in District Court for judicial enforcement of its subpoenas duces tecum premature where Board had failed to rule upon such petitions to revoke?

STATEMENT

A. The Board Representation Proceeding

In November 1955, Local 1625, Retail Clerks International Association, AFL-CIO, filed a petition pursuant to Section 9 (c) of the Act with the Board's Regional Office. The petition sought a representation electing among the employees of a retail jewelry store in Miami, Florida (R. 13-18). At the hearing held on the petition, the employer filed a motion to dismiss the proceeding on the ground that his interstate operations did not meet the Board's administrative standards for the assertion of jurisdiction. He refused, however, to testify or furnish information on this

issue, because of the unreasonable and oppressive nature of the subpoenas, whereupon the hearing was adjourned for the purpose of permitting subpoenas to be issued to secure the relevant data and testimony. Five subpoenas *duces tecum* and one subpoena *ad testificandum* were then issued. In accordance with the Board's regulations and practice, they were issued by the Regional Director upon application of the Board attorney assigned to the case, and contained the facsimile signature of a Board member, here Member Murdock (R. 29-35, 36-38, 62-66, 85-89, 109-113, 136-138, 139-140).

The Respondent corporations, together with the several other corporations named in the subpoenas, operate a retail jewelry business in the State of Florida. Each retail store is operated by a separate Florida corporation. The only store involved in the Board representation case is the Miami, Florida store and the only employees involved were the employees of that store. Oliver A. Jenkins, the president of the several Respondent corporations, was named in the *ad testificandum* subpoena (R 6-12, 48-53).

B. The Subpoenas

The subpoenas *duces teeum* were served upon the Respondent corporations on January 3, 1956 and the Respondent Oliver A. Jenkins was served the *ad testificandum* subpoena on January 6, 1956. (January 3, 1956 was a Tuesday; January 6, 1956 was a Friday). The subpoenas required the production of books and records of the several corporations, or in the alternative, a statement, showing generally *all* purchases made by all of said corporations *for an entire year; all purchases* made *for or on behalf of* some *sixteen* or *eighteen other corporations*, the identity of *each supplier* and the amount of *each individual purchase*

from *each supplier, all sales* made by *each* of said corporations to some sixteen or eighteen *other corporations* and the dollar value of *each sale*—all for an *entire year of operation* of *each* of the several corporations served with subpoenas. It is to be noted that the subpoenas required the furnishing of records or statements showing *separately* records of purchases made by *each corporation subpoenaed* for or on behalf of some *sixteen* or *eighteen* other corporations and the individual amounts of *each* sale to *each* corporation, all for an *entire year* of operation. It is further to be noted that the subpoenas required the furnishing of records or statements showing in addition to the records of the purchases, *each and every sale* made by Duval Jewelry Company, Jenkins Jewelry Co. and Jenkins and Sons, Inc., to *each* of *sixteen* or *eighteen other corporations* operating sixteen retail jewelry stores throughout the State of Florida—all for an *entire year of operation.*

The principal offices of all Respondents are located in Jacksonville, Florida, where most of the records of all are kept.

It is further to be noted that the subpoenas required the production of said records, or said statements, on January 10, 1956, at Miami, Florida, a city approximately 350 miles away from the principal offices of said corporations. Thus the subpoenas to the corporations allowed Respondent corporations less than six working days within which to comply and Oliver A. Jenkins was allowed less than three working days within which to comply. (R. 51-52; 62-66; 74-76; 86-88; 97-99; 109-113; 114-115; 122-124; 136-138; 142; 148-150).

The subpoenas *duces tecum*, by their terms, allowed the Respondents the privilege of submitting a "written state-

ment giving the information sought to be subpoenaed" (R. 9) in lieu of producing the records. However, the Respondents alleged in their several answers in the District Court (see citations in preceding paragraph) that the preparation and production of the statements allowed by the subpoenas would have required approximately eight weeks' time because of the all-embracing and detailed nature of the demands made. These statements in the answers were never denied nor questioned by the Board at any stage of the proceedings.

The primary purpose of the subpoenas, as stated in the Board's petition in the District Court (R. 11), was to enable the Board to determine whether or not it would assert jurisdiction over Respondents. The jurisdictional standards of the Board regarding retail stores depend upon the annual dollar volume of purchases and sales, both directly and indirectly from suppliers out of the State and upon dollar volume of shipments eventually going out of the State. It therefore became necessary under the subpoenas to determine from the records of sales and purchases of each corporation, for an entire year, the dollar amounts of *each sale* and the dollar value of *all purchases* made by the corporations and to separate the *direct* from the *indirect* purchases, since different standards are applied by the Board to direct and indirect purchases. Briefly, direct purchases are those made and received from out-of-State suppliers. Indirect purchases are those made of goods which originated outside the state but are purchased within the state.

It is obvious that it became necessary for the Respondents, in order to intelligently present their position on jurisdiction to the Board, to ascertain these figures and data for their own information and guidance. Without such data Respondents would have been prejudiced in the presentation

of their defenses to the petitions and the several respondent corporations would have been unable to present an accurate and complete picture of their operations to the Board.

The Board originally named the single Miami store as the employer in the representation case. However, after the Miami corporation answered filing a motion to dismiss, supported by affidavit, that the Miami corporation was not subject to the Board's jurisdiction under its standards then in effect, the Board amended the representation petition and added several other corporations not in Miami and whose employees were not in any way involved (Case 10-RC-3333; R. 8; 57; 80; 103; 129).

The Respondents timely filed their several petitions to revoke with the National Labor Relations Board in Washington, sending a courtesy copy to the hearing officer (R. 41, 69, 92, 117, 143). These petitions to revoke were filed directly with the Board and addressed to the Board. The Board bundled up the petitions to revoke and returned them to counsel for Respondents, refusing even to file them. As shown on the petitions to revoke they were mailed to the Board on January 7, 1956. The Board retained them until January 11, 1956 when they were mailed back. (See Exhibit A). The hearing officer in the representation case thereupon undertook to rule upon the petitions to revoke, denying each petition, and asserting as the ground for denial that "said petitions raise no substantial issue as to the validity of said subpoenas" (R. 45-46).

The Respondents did not comply with the subpoenas and the Board commenced suits for enforcement in the District Court, which denied enforcement upon the grounds

that the subpoenas were upon their face "unreasonable, burdensome and oppressive" and were not issued upon the application of a "party" to the proceedings as required by the Act (R. 152-155).

The Board appealed the District Court's order to the United States Court of Appeals for the Fifth Circuit specifying as errors: (1) That the District Court erred in holding the subpoenas to be "unreasonable, burdensome and oppressive" and (2) That the District Court erred in holding that the subpoenas were not issued to a "party" to the proceedings, and (3) That the District Court erred in quashing the subpoenas and refusing enforcement.

The Court of Appeals did not rule upon the oppressive nature of the subpoenas and did not mention this as to the *duces tecum* subpoenas and only incidentally mentioned this issue as to the *ad testificandum* subpoena (R. 164 and note 8, page 164), stating in a note to the text of the opinion that "In any event, courts can usually remove the oppression or burden without quashing the entire subpoena". It is to be remembered, however, that the trial court made no effort to remove the oppressive nature nor did the Court of Appeals. The reason is of course obvious—both courts had found that the subpoenas could not have been enforced upon other grounds regardless of their oppressive nature.

We have gone into some detail in this statement of the case because we do not agree with the Board's statement of the proper issues in this court and we believe the record and this statement properly justifies Respondents' statement of issues.

SUMMARY OF ARGUMENT

Hearing Officers of the Board in representation cases have no power, authority or jurisdiction to rule upon petitions to revoke Board subpoenas.

At the outset it is well to recognize that we are here concerned with a *representation* Board case and a *hearing officer*, not with *an unfair labor practice* case and a *trial examiner*. Originally the Board considered the two approximately equal in authority and duties in all respects and especially in reference to subpoena matters. The Series 1 Rules and Regulations (Series 1, effective April 27, 1936, 1 LRRM 811-820) applied equally to hearing officers and trial examiners.

The hearing officers originally were also called trial examiners and all trial examiners hearing both representation and unfair labor practice cases were under the Board or the Chief Trial Examiner (Section 5, Rules and Regulations, Series 1). In all respects the investigative and prosecutive authorities and duties under the Act were thus all under the control of the Board without separation.

The Administrative Procedure Act (Title 5, § 1001 et seq. U.S.C.A.) effective June 11, 1946, made a distinction between hearing officers in representation cases and trial examiners in unfair labor practice cases. Section 1004 of that Act specifically excepted "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved" (among others) "the certification of employee representatives". Therefore, as to the greater part of the Administrative Procedure Act, the hearings and

hearing officers in representation cases are not covered, but the entire act does apply to trial examiners and unfair labor practice hearings.

As to this issue we are concerned with interpretation of Section 11 (1) of the Act and the intent of Congress in its enactment. There is no question but that under the literal wording of the Act only the Board can rule upon petitions to revoke subpoenas. The intent of Congress in its enactment is shown by reason of the fact that Section 11 (1) changed entirely the handling of subpoenas, not only as to issuance but as to revocation. Congress obviously was aware of Board practice and just as obviously changed it. The substance of the changes as to subpoenas was that issuance was made mandatory and merely a ministerial duty and for the first time, a procedure was set up for revocation.

Board practice under the original National Labor Relations Act (49 Stat. 449) authorized the Board to issue subpoenas but neither that law nor Board Rules provided for revocation. Thus trial examiners or regional directors decided upon the validity of subpoenas at the time of application or issuance. This practice was changed by the passage in 1947 of the Amendments to the National Labor Relations Act so that the issuance of subpoenas was made merely a ministerial, automatic, mandatory Act by hearing officers, trial examiners or regional directors upon a proper application for such subpoenas. But the amendments of 1947 changed other practices of the Board by setting up revocation machinery; indicating disapproval by Congress of the previous procedures of the Board as to the entire method of handling subpoenas.

The Brief and argument of the Petitioner here seemingly have an irreconcilable conflict: The argument is (Petition-

er's Brief 8-10) that the Bord has not delegated authority to hearing officers to rule upon subpoenas and that if they have delegated such power it is authorized by the Act. Respondents take the position that there has not been and cannot legally be a delegation of authority to hearing officers to rule upon revocation of subpoenas. This is shown by the legislative history of the Act and by the clear and unambiguous wording of the Act itself.

The Board's application to the District Court for enforcement of the subpoenas *duces tecum* was premature because the board had not ruled upon said petitions as required by law.

The Act provides in Section 11 (1):

> "Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition *the Board* to revoke, and *the Board* shall revoke such subpena if in *its* opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in *its* opinion such subpena does not describe with sufficient particularity the evidence whose production is required". (Emphasis supplied).

The section above quoted very clearly, and in unambiguous words, places the authority to rule upon revocation only in the Board itself. Aside from the legislative history of the Act, which will be adverted to later, there is other wording indicating the intent of Congress. First, it is obvious that if Congress had intended that this authority be delegated it could very simply have made it so. As an example of this in the next ensuing words after the above quoted part of Section 11 (1) occurs this language:

"Any member of the Board, *or any agent or agency designated* by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. * * *" (Emphasis supplied).

The last quoted language itself refers to hearing officers and trial examiners and allows the Board to delegate to them, as the Board's representatives, the power to administer oaths, examine witnesses and the like. But this grant of power is pointedly left out of the immediate preceding wording. It also should be noted that the latter wording merely *confirmed* the existing practice of the Board and the wording about revocation of subpoenas *changed* Board practice.

Since hearing officers have no authority nor jurisdiction to rule upon recovation of subpoenas it follows that the application to the District Court was premature, as found by the Court of Appeals.

It is a novel proposition the Petitioner makes. The Respondent refused to comply with subpoenas; petitions to revoke were filed directly with the Board and returned by the Board without a ruling on them; the hearing officer whom the Board says has authority delegable to him from the Board to rule, attempted to rule upon the petitions and notified the Board of his ruling; the Board itself then, after refusing to rule, goes into District Court seeking enforcement of the subpoenas and now tries to say that because it has not ruled the Respondent cannot defend the suit. This position is not justified by the Act which does not provide for an appeal to the Board from a hearing officer's ruling; the Petitioner attempts to justify it upon the ground of a Rule adopted by the Board which, in negative language only, says that a party cannot appeal a hearing officer's

ruling directly to the Board except by express permission of the Board. This is neither an appeal as a matter of right nor a *requirement* of the rule. The doctrine of exhaustion of administrative remedies does not apply to the Respondents who were not the moving parties in the enforcement proceeding and certainly would not apply to bar the Respondents from asserting their valid and bona fide defenses to the enforcement proceeding especially where the Board had several opportunities to rule upon the petitions, was asked to do so and refused.

ARGUMENT

A. Hearing Officers of the Board in Representation Cases Have No Power, Authority or Jurisdiction to Rule Upon Petitions to Revoke Board Subpoenas.

Hearing officers are employees of the Board having very little power or authority. Under the Act they are expressly prohibited from making "any recommendations" in respect to the representation issues in the cases before them even though the hearings are *investigations* rather than prosecutions. Their function is to get up the facts and send them to the Board, a purely administrative duty. Hearing officers cannot rule upon motions to dismiss, or upon any of the issues regarding the bargaining unit, or supervisory employees or their status or even make any recommendations thereupon. They cannot rule upon the credibility of witnesses even though they are the only Board employee who hears the witnesses testify and can observe their demeanor. They cannot rule upon conflicts in testimony. They cannot even make recommendations to the Board on these matters. But their powers were not always thus. Board pro-

cedure under the National Labor Relations Act as originally enacted, and the Rules of the Board prior to the 1947 Amendments to the law, hearing officers in both investigative hearings and in prosecutive hearings in unfair labor practice cases were considered on a par. At that time the hearing officers ruled upon the validity of subpoenas at the time a request for a subpoena was made. If the hearing officer felt a subpoena should not be issued, he decided that it shouldn't be. Hearing officers and trial examiners had power under the Board's Rules (Series 1 effective April 27, 1936) to rule upon motions to dismiss, and in fact Section 15, Article II, provided that he "shall rule upon all motions" (with some exceptions not pertinent here). The hearing officers could make reports and recommendations.

The Congress in 1947 changed the law and the practice of the Board radically. Congress attempted to separate the purely administrative and investigative functions of the Board in representation cases from the function of prosecution in unfair labor practice cases. Hearing officers in representation cases were reduced merely to administrative employees with no judicial authority and to a state of little more than reporters. By Act of Congress they no longer were permitted to make a judicial decision upon the propriety or legality of subpoenas. And Congress went further than that—it provided in clear and unmistakable language that only the Board could rule upon revocation petitions. Congress was of course aware of Board practice at the time of Amendments of the National Labor Relations Act. Since there was nothing in the original Act about revocation and nothing in the Board's Rules about revocation and the practice of the Board's hearing officers was to rule upon revocation, it seems inescapable that Congress intended to change not only the exercise of this authority by the hear-

ing officers but also to set out an entirely new and clear-cut method for handling the judicial act of ruling upon revocation of subpoenas.

Under the Act only the Board can apply to the courts for enforcement of a subpoena. Here the language in the Act is the same as in the reference to revocation—" * * * upon application *by the Board* (the court) shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered * * * ." (Emphasis supplied). There has been no question by the Petitioner nor anyone else so far as we know that the wording of this section means anyone other than the Board itself, and the Board itself brought the application to the District Court.

Notwithstanding the plain mandate of Congress that hearing officers and even the Board itself must issue subpoenas when requested, the practice of the Board actually subverts the intent of the law and Congress. In practice if the hearing officer is requested to issue a subpoena, he does so, but if he thinks it improper he will advise the party subpoenaed if he is present or the other party to the proceeding that he will entertain and grant a motion to revoke. Thus the Board's practice in effect has been continued just as it was before the Amendment as to issuance of subpoenas and if the Board prevails in this feature of this cause the Board's practice will, in effect, be the same as it was before the attempt of Congress to change it—the hearing officer can prejudge the validity of a subpoena by announcing he will issue it and immediately revoke it. For an example of Board practice in this respect we submit one of the cases cited by the Petitioner in its brief *Burnup & Sims Inc.*, 95

NLRB 1130, Case No. 10-RC-1209. In this case, which the Petitioner cited as giving an example of the Board reviewing a decision of a hearing officer on a petition to revoke (Pet. Brief 20, Note 9), the hearing officer stated (Tr. 23): " * * * the Act requires me to issue that subpoena, which I will do if requested. I was merely stating to him (counsel) that in the event of a petition to revoke by the union, that I would grant that motion to revoke * * * ." Later when counsel wanted to make it clear that the union would make a motion to revoke the union representative asked the hearing officer "Let me see if I understand just what you want me to do" (Tr. 26). The practice of the Board's hearing officers where a subpoena is prejudged by him to not be proper, is to announce and even suggest to the other party, or the party subpoenaed, that even though he is required to issue the subpoena he will immediately revoke it.

The Administrative Procedure Act also undoubtedly had some effect upon Congressional action in amending the National Labor Relations Act in respect to the powers and authority of hearing officers in investigative proceedings. That Act recognized the minor position held by hearing officers in representation cases and specifically excluded representation cases from most of its purview, although all of the applicable parts of that Act apply to trial examiners in unfair labor practice cases.

This case is not concerned with the issuance of subpoenas but with their revocation. A subpoena must be issued if properly applied for. The *issuance* of a subpoena therefore requires no discretion or judicial consideration. It does not involve adverse rights. However, the *revocation* of a subpoena is an entirely different matter. The agency ruling upon revocation is called upon for interpretations of

law and court decisions. Legal rights and liabilities, even Constitutional rights, are asserted and defended and ruled upon in such cases. The provisions in the Act relating to revocation of subpoenas are, in part, for the protection of parties and others from oppressive or unreasonable use of the subpoena powers. We believe Congress intended only the Board to have this important power and authority. If the Petitioner's theories are correct and its present practices are allowed to continue, parties to Board proceedings will remain subject to the whims of minor employees of the Board in respect to one of the most important judicial powers—the power of subpoena.

Remembering that subpoenas in a representation case are not returnable before a judicial officer, but to a hearing officer of strictly limited and nonjudicial powers, makes this court's observations in *Cudahy Packing Company of Louisiana v. Holland* (1942) 315 U. S. 357, 62 S. Ct. 651, 86 L. Ed. 895, 5 Labor Cases ¶ 51, 128, appropriate:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

Aside from the general considerations noted above, and the plain and unambiguous wording of the Act itself upon the question of the authority of a hearing officer to rule upon petitions to revoke subpoenas, we have compelling factors in the legislative history of the Act. The Court in the case of *N.L.R.B. v. Pesante*, U.S.D.C. So. D. Calif., 119 F. Supp. 444, 25 Labor Cases ¶ 68,209, 33 LRRM 2569 (1954), held that only the Board, or an authorized panel of members of the board, had authority to rule upon petitions to revoke

subpoenas, and that such power could not be delegated, by rule or otherwise, to hearing officers, or any one else and in so holding, discussed thoroughly the legislative history of the Act. The Court said:

"The Act as originally passed by the House of Representatives contained a provision in Section 11 which permitted the Board or *its duly authorized agent or agents* to revoke, *'if in its, his, or their'* opinion evidence did not relate to any matter under investigation or *'if in its, his, or their opinion'* the subpoena did not describe with sufficient particularity the evidence whose production was required. The Act as originally passed by the Senate had no provision in it relating to the revocation of subpoenas. *But the Act as finally adopted by both houses, dropped the language which permitted any duly authorized agent or agents of the Board to revoke subpoenas or to hear petitions to revoke,* as contained in the original House Bill, and gave that authority only to the Board.

"The specific language contained in the original House Bill is as follows: 'Within 5 days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board or *its duly authorized agent or agents* to revoke, and the Board, or *such agent or agents,* shall revoke such subpoena if in its, *his,* or *their* opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation or any matter in question in such proceeding, or if in its, *his* or *their* opinion, as the case may be,' the subpoena did not describe with sufficient particularity the documents desired." (Emphasis in original text).

The Court further stated:

" * * * Obviously from reading the text of the Act, and without any recourse to the legislative history, the con-

clusion is inescapable that Congress intended a different power to be granted to the Board in connection with the issuance of subpoenas than it did in its grant to the Board of the investigatory powers and the administration of oaths; and, just as obviously, it intended to grant a different power to the Board in connection with revocation of subpoenas than either the issuance thereof or the investigatory and oath giving powers.

"From the face of the Act and from the legislative history it would seem to me that the powers granted in Section 11 concerning the issuance of subpoenas was not delegable and might be exercised by the Board *or any member* thereof, but that the *revocation* of subpoenas could *only* be exercised by the Board acting as a *whole Board* or through one of its panels authorized to be set up in panels of three, as set forth in Section 3 (b) of the Act (29 U.S.C.A. ¶ 153 (c))." (Emphasis in original text).

The Court in the *Pesante* case quoted extensively from the United States Supreme Court decision in the *Cudahy* case (supra) particularly noting that the Supreme Court emphasized the fact that specific authority to delegate subpoena power was given in both Senate and house bills as the Fair Labor Standards Act was originally passed but that that authority was eliminated when the act was finally passed by Congress, and that exactly that same situation occurred when the Act in question was passed, and as to the exactly same matter: subpoena power.

The Court in the *Pesante* case also quoted from the case of *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 US 111 (1947), in reference to the question of whether or not the Board could by rule or regulation delegate power to perform a particular function, as follows:

"The Mohawk case further distinguishes the Cudahy case in saying that the Act involved in the Cudahy case granted no broad rule-making power, whereas the Emergency Price Control Act did grant such rule-making power in the following language: 'The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act,' which is almost the same language as that contained in the Taft-Hartley Act. As to that the Supreme Court further said in the Mohawk case, (page 121): 'Such a rule-making power may itself be an adequate source of authority to delegate a particular function, *unless by express provision of the Act or by implication it has been withheld.* See Plapao Laboratories v. Farley 67 App. D.C. 304, 92 F. 2d 228)' (Italics Supplied). The express provisions of Section 11 of the Taft-Hartley Act granting power to the *Board or any member* thereof to issue subpoenas, and to the *Board* only to hear and act on petitions for revocations, when considered in light of the legislative history, specifically eliminating the power of any agent or agency of the board to hear petitions to revoke, brings Section 11 within the exception noted above in the Mohawk case, and clearly within the holding in the Cudahy case, that where an express delegation contained in an act before its final passage, is dropped out in conference, and thus passed by Congress, there is a clear implication that Congress did not intend such delegation" (Emphasis as in original text).

The *Pesante* case is well reasoned. The decision is exactly in point and held to be unlawful the very practices and procedures now insisted upon by the Board. The *Pesante* case was decided against the Board in these particulars, was not appealed, has not been reversed or overruled and was followed by the court below in respect to delegation of power to hearing officers in representation cases. The *Pesante* case and the judgment appealed from, are the only decisions of any court which rule upon the

issue of whether or not a *Hearing Officer* in a *representation proceeding* before the Board has authority to rule upon revocations of subpoenas, so far as we know. However, the decision of this Court in *Cudahy Packing Company of Louisiana v. Holland,* supra, covers completely the question of *delegation* of the subpoena powers by an administrative officer. In that case the Wage and Hour Administrator made somewhat the same contentions Petitioner is making here, i.e., that the power to delegate the subpoena power is to be inferred from the nature of his duties and from the fact that under the Act in question in that case he may, through designated representatives, gather data and make investigations authorized by that Act, and he pointed to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of that Act. From these factors he argued that Congress must have intended that he should be permitted to delegate his authority in reference to subpoenas. The Supreme Court held that the Wage and Hour Administrator was not authorized to delegate his subpoena powers—although he could exercise them himself.

This Court said:

> "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a congressional purpose not to authorize by implication a delegation of the subpoena power."

In that case, as in the instant case, the law in question did not specifically authorize the administrator to delegate the subpoena power to others. The Court also noted that the legislative history of the Wage & Hour Act showed that specific authority to delegate subpoena powers, which

had been inserted in preliminary drafts of the Wage & Hour Act, was eliminated from the final wording of the Act by the Conference Committee. This was also the case with the Labor Management Relations Act, in *exactly* the same manner and *exactly the same subject*. (See *Pesante*, supra).

This Court stated further:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. * * * All these are cogent reasons for inferring an intention of Congress not to give the responsible head of an agency unrestricted authority to delegate the subpoena power which it has in terms granted only to him.
>
> "The subpoena power differs materially in these respects from the power to gather data and make investigations which is expressly made delegable by Paragraph 11. Without the subpoena that power is in effect a power of inspection at the employer's place of business to be exercised only on his consent. It is much less burdensome than the requirement of his selection of great numbers of books and papers and their production at other places. Because of these differences it seems to us fairly inferable that the grant of authority to delegate the power of inspection and the omission of authority to delegate the subpoena power shows a legislative intention to withhold the latter. Moreover, if a subpoena power in the regional directors were to be implied from their delegated authority to investigate, we should have

to say that Congress had no occasion expressly to grant the subpoena power to the Administrator, who also has the power to investigate, and that the grant to him was superfluous and without meaning or purpose.

"The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena powers. The Interstate Commerce Act, the National Labor Relations Act, and the Federal Trade Commission Act, whose subpoena provisions were adopted by the present Act and by the Packers and Stockyards Act, all fail to grant authority to delegate the issuance of subpoenas. It appears that none of the agencies administering these acts, has construed the authority of its head to include the power to delegate the signing and issuance of subpoenas. On the other hand, Congress, in numerous cases, has specifically authorized delegation of the subpoena power. In others it has granted the power to particularly designated subordinate officers or agents, thus negativing any implied power in the head to delegate generally to subordinates. The suggestion that the Administrator is given authority to delegate the subpoena power because the applicable Trade Commission Act authorized individual members of the Commission as well as the Commission itself to sign subpoenas overlooks the fact that the Administrator alone occupies a position under this Act corresponding to that of the Commissioners under their Act. The structure of the Trade Commission Act lends no support to the view that the Administrator has an implied power to delegate the signing and issuance of subpoenas to persons undesignated by the statute, a power not granted to or exercised by the Commission or its members.

"All this is persuasive of a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted. That purpose

has been emphasized here not only by the authority expressly given to delegate the power to conduct investigations, and in the adoption by reference of the subpoena provisions of the Federal Trade Commission Act, which contain no authority to delegate, but by the legislative history of the present Act, which shows that the authority to delegate the subpoena power was eliminated by the Conference Committee from the bills which each House had adopted. Such authority expressly granted in the bill which passed the Senate, was rejected by the Conference Committee. It also discarded the provisions of the House bill which committed the administration of the Act to the Secretary of Labor, who has a general power of delegation under Rev. Stat. Sec. 161, 5 U.S.C. Sec. 22, and placed in his stead the Administrator, who was given only the subpoena powers of the Federal Trade Commission incorporated in the House bill.

"We cannot assume that Congress was of the opinion that the present agency, when appropriately organized for the purpose, would be any the less able to function without the power in the Administrator to delegate the signing and issuance of subpoenas than the Federal Trade Commission, the Interstate Commerce Commission, and other agencies which have not been given and do not assert the power. Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction."

The facts of the *Cudahy* case, the law involved, and the issues, are almost indentical with the instant facts, law and

issues. There is great similarity even in the legislative history of the two laws involved and the practice of the two administrative agencies involved.

Upon the matter argued at this point, to wit, that the Board could not delegate its subpoena powers, the Respondents again cite the case of *National Labor Relations Board v. Pesante*, supra. This was a decision against the National Labor Relations Board, involving almost exactly the same issues as are involved in the instant case, which decision was not appealed and which has not been overruled or reversed. In the *Pesante* case the court held that the power granted by Section 11 of the Act concerning the revocation of subpoenas could only be exercised by the Board, or a member thereof, and was not delegable. The Court said:

> "The first sentence of Section 11 (1) relates to investigations. It specifically gives authority to the Board or its duly authorized agents or agencies to do the things therein set forth. The second sentence contains no such broad delegation but is more limited and simply provides *the Board or any member thereof* shall issue subpoenas. The third sentence relates to revocation and is still more limited. It omits any reference not only to any member of the Board or any of its agents or agencies but specifically *empowers the Board* and the Board only to revoke. The fourth sentence relates to the administration of oaths and the conduct of hearings. It is not limited and gives that power to *any member of the Board, any agency, or agency designated by the Board* for such purposes. It must furthermore be noted that Section 11 applies to *all hearings and investigations*. Obviously from reading the text of the Act, and without any recourse to the legislative history, the conclusion is inescapable that Congress intended a different power to be granted to the Board in connection with the issu-

ance of subpoenas than it did in its grant to the Board of the investigatory powers and the administration of oaths; and, just as obviously, it intended to grant a different power to the Board in connection with revocation of subpoenas than either the issuance thereof or the investigatory and oath giving powers. From the face of the Act and from the legislative history it would seem to me that the powers granted in Section 11 concerning the issuance of subpoenas was not delegable and might be exercised by the Board *or any member* thereof, but that the *revocation* of subpoenas could *only* be exercised by the Board acting as *a whole Board* or through one of its panels authorized to be set up in panels of three, as set forth in Section 3 (b) of the Act (29 U.S.C.A. c. 153 (c))." (Emphasis in original text.)

The Court in the *Pesante* case followed this Court's decision in the *Cudahy* case supra and quoted at length from that decision.

The Petitioner cites the case of *National Labor Relations Board v. John S. Barnes Corp.*, 178 F. 2d 156, 17 Labor Cases ¶ 65,464 (1949). In this case the Seventh Circuit Court of Appeals held that the *issuance* of a subpoena in a representation proceeding by a regional director of the Board was valid as against contention such power could not be lawfully delegated. The Court below said of the Barnes decision:

> "The Seventh Circuit's remarks about petitions to revoke in N.L.R.B. v. John S. Barnes Corp., 178 F. 2d 156, 160, were necessarily dicta as it does not appear that any such petition was filed in that case."

To add to that, the Barnes case was concerned solely with the *issuance* of subpoenas which under the Act is a

purely ministerial act not in any respect comparable to *revocation*.

The Petitioner cites *N.L.R.B. v. Lewis Food Co.*, (10-29-57) (CA-9), 41 LRRM 2078, in which the court held that the power to revoke subpoenas may be delegated by the Board to a trial examiner in an unfair labor practice proceeding. We submit again that it is to be noted that this too is an unfair labor practice proceeding before a trial examiner, which proceeding is entirely different in scope from the proceeding in this case, and that the judicial powers and authority of a trial examiner are not comparable to the purely ministerial or administrative investigations conducted by a hearing officer in a representation case. It is further noted that the *Lewis* decision cites with approval and follows *N.L.R.B. v. Gunaca*, 230 F. 2d 542, 37 LRRM 2576, affirming *N.L.R.B. v. Gunaca*, 185 F. Supp. 790, 37 LRRM 2109, and *N.L.R.B. v. International Typographical Union*, 76 F. Supp. 895, 21 LRRM 2483 (1948). Both of these cases were unfair labor practice proceedings before trial examiners. In the *Gunaca* case the question was whether the Board could delegate its power of issuance and revocation of subpoenas. In upholding the power of delegation, however, the Court relied upon Section 7 (b) (Title 5, P. 1006 (b) U.S.C.) of the Administrative Procedure Act. In the *Typographical Union* case, which was quoted with approval and followed in the *Gunaca* case, the Court relied upon the same section of the Administrative Procedure Act stating that the National Labor Relations Act and the Administrative Procedure Act should "be read together". Neither of the decisions in these cases applies to the instant case, nor does their reasoning apply, since the cited section of the Administrative Procedure Act does not apply to representation cases nor to hearing officers in those cases. In the *Lewis* case the Court stated:

"The Pesante and Duval cases are neither contrary nor apposite. Both involved the question of whether a Regional Director was a party to a representation hearing, as distinguished from an unfair labor practice proceding."

In the *Lewis* case the Court also states, referring to the legislative history of the Act:

"The Congressional history, although somewhat favorable to appellees' position, is realistically meager and inconclusive. The Act was discussed prolifically in Congress, but the delegability of powers granted by Section 11 (1) was not."

Then the Court goes on to attempt an interpretation of the Act on the basis of the "practical difficulties in administration which would arise as a consequence of holding that the power to rule on petitions to revoke subpoenas is non-delegable" and that these "difficulties" would substantially impede the effectuation of the Board's primary function. We submit first that this Court should not approve such a "rule of convenience" in interpreting the legal effect of a statute. It would seem that this is engaging in "judicial legislation" and the Ninth Circuit should have made a decision upon the wording of the Act, which is plain enough, and such legislative history as we have, which certainly supports the position that such powers are not delegable.

As to the practical side of administering the Act under the Respondents' theories and the decision of the Court below this Court has stated in a similar reference in the *Cudahy* case:

"Even though Congress has underestimated the burden which it has placed upon the Administrator, which is

by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction."

The Petitioner states in its brief (Pet. Brief 38) that it is invoking "the traditional rule, relied upon by this Court in *Mohawk*, that a statute will not be construed to make it administratively unworkable if another construction is reasonably possible."

As the Fifth Circuit pointed out in this case:

"An administrative remedy under which any person served with a subpoena duces tecum may seek protection from the Board itself to make certain that the evidence is described with sufficient particularity and is relevant to the inquiry should not, we believe, prove unduly burdensome to the Board. If it does the remedy lies with Congress, not with the courts. In most cases, methods less burdensome to the respondents than subpoenas duces tecum are availabe to the Board, such as the right of 'the Board,' or its duly authorized agents or agencies' to have access to and to copy any evidence, supplemented if need be by the use of subpoenas ad testificandum, required to be issued upon the application of any party."

Though the Petitioner takes the position that Congress could not have intended that it have these possible additional duties there is nothing in the legislative history of the Act to show that Congress considered the workload of the Petitioner in these respects at all. Apparently Congress enacted the law, with its specific requirements as to revocation of subpoenas, without any consideration of the work of the Board, one way or the other.

For the Petitioner to say that the Respondents' and the Fifth Circuit's interpretations of the Act would make the Act "unworkable" is to presume a state of facts, which are not existent, have not been shown to be even a possibility and certainly is not admitted by Respondents. The Petitioner admits (Pet. Brief 36) that the Board's processes are interrupted for consideration of subpoena matters "in only a handful of cases". Under one of the theories of Petitioner the hearing officer could rule upon the subpoena revocation subject to review by the Board. It is evident that this argument is advanced to permit the Board to continue its present practice of having hearing officers rule upon revocation of subpoenas. However, if this should be approved, the Petitioner is in effect admitting that there has been no final ruling of the Board in this case and therefore the judgment of the Court below as to this point should be affirmed.

Although the Board has given considerable statistical information (Pet. Brief 36), it has not cited to this Court any figures showing the number of subpoena questions which have arisen. Out of the thousands of cases handled by the Board only nine cases are mentioned in the Appendix and nine cited at Note 9 on page 20. The Board obviously keeps records of all subpoenas and their disposition. Note 82, page 16, Administrative Procedure in Government Agencies, Part 5, Sen. Doc. 10, 77th Congress, 1st Session, states that regional directors and trial examiners "are required to keep a record of each subpoena issued, stating the name of the person subpoenaed, the hearing for which he is summoned, and whether the subpoena was actually used". Subpoena questions do not ordinarily arise in Board proceedings and enforcement proceedings are very rare. In the Twentieth Annual Report of the Board for the

fiscal year ended June 30, 1955 (page 155) there were only two cases of subpoena enforcement mentioned and in the next report (June 30, 1956) (pages 159-160) there were mentioned only the Gunaca and the instant cases.

It is true that the Board has a large number of both representation and unfair labor practice cases filed during a year. However, the great majority of them are disposed of without any sort of formal action—much less issuance of subpoenas. For example, for the fiscal year ending June 30, 1956 (the last figures available) there were 8070 representation cases disposed of, and 78.5% of them were closed without any formal decision by the Board. There were 5619 unfair labor practice cases closed and 89.5% of these were disposed of without any formal action by the Board (Twenty-First Annual Report, page 3). The Petitioner states in its Brief (page 36) that there were 855 subpoenas issued, 218 of them *duces tecum*, during a "comparable period", evidently the year ending June 30, 1956. Since under the decision of the Court below, accepted by the Petitioner in this respect, only *duces tecum* subpoenas are subject to petitions to revoke, the Board then could only be concerned with a possible maximum of 218 subpoenas in representation cases at least for that year. Since the Board gave no figures on how many of these subpoenas were contested we can only assume the number was extremely small. This conclusion is supported by the fact that apparently there were only four enforcement proceedings in two years where decisions occurred in those two years. This is also supported by general knowledge of Board practice—that very few subpoena questions arise in representation hearings.

We also can assume that the Board has followed the judgment of the Fifth Circuit in this case. At least the

Board followed it to the extent of itself ruling upon a petition to revoke a subpoena in another representation case (*Cosco Products Company*, Case No. 12-RC-195, N.L.R.B. , Nov. 1, 1957). In this case the employer's petition was mailed to the Board on Saturday, September 14 and the Board's order denying the petition (without any statement as to the grounds or reasoning upon which it was denied was made on Tuesday, September 17. We seriously doubt if the consideration of this petition to revoke, or any other petitions to revoke subpoenas, could or would cause the Board any considerable interference. In the *Guinaca* case the Court stated, as some basis for holding that subpoena power could be delegated in an unfair labor practice case, that

> "It would seem to this Court that one should be very slow to presume that Congress intended to enact a statute which would require a review of testimony possibly two or three thousand miles from the place where the testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N.L.R.B. that would be involved."

The above assumption does not exist in actual practice.

As we have seen in the case just above cited, the Board does not do that. In the *Cosco* case cited the Board made a decision upon the basis of the petitions as filed. Why should there be any more concern by the Board with this than there is with the numerous other Board orders?

If the board has complied with the Fifth Circuit's order in this case in the geographical territory covered by that Court, as it appears the Board has done, it has not caused

any great upheaval in the Board's processes so far as is apparent. The Board has not mentioned to this Court anything at all about the actual (not the prophesied) experience the Board has had in this territory for that period of time, to-wit, from April 2, 1957, regarding rulings on petitions to revoke subpoenas.

We conclude that the Board has no real basis for a contention that its processes would grind to a halt or even be seriously interfered with when a petition to revoke subpoenas is presented. It certainly would not require the Board to consider any review of testimony (what would be the necessity for that?), nor require any delay or unusual expense. As demonstrated in the *Cosco* case, *supra*, the Board need merely to handle such a petition in the usual routine manner and rule upon it, basing its ruling upon whatever is stated in the petition and any answer filed.

B. The Board's Jurisdiction as to Revocation of Subpoenas Is Original and Not Appellate

The Petitioner contends that there has been no "true delegation" of the Board's power to rule on petitions to revoke subpoenas because the Board retains "ultimate control". No cases are cited supporting this theory as to the National Labor Relations Board.

We do not believe the Petitioner's position on this is sound. The jurisdiction of the Board under the Act in the matter of revocation of subpoenas is original and not appellate and the Board cannot by its own rule change that. The Board cannot legally permit hearing officers to rule upon petitions to revoke subpoenas in representation cases at all. But Board has attempted (though without power

to do so) to give hearing officers power to rule upon revocation of subpoenas by stating in its rules (Section 102.58 (e): "The regional director or the hearing officer, as the case may be, *shall revoke* the subpoena, if *in his opinion,* the evidence whose production is required does not relate to any matter under investigation. * * * " (emphasis supplied). This wording clearly shows an attempt to bestow upon hearing officers full power to rule upon revocation and full power to exercise his own individual judgment in doing so. The Petitioner is contending that the jurisdiction of the Board is appellate in nature, and this would be the only way such a theory could be supported. The Board in its Rules uses the words "special *appeal*" (emphasis supplied). The court below considered this and specifically stated in its opinion that the Board's jurisdiction is original in this respect and not appellate, in these words:

> "Under the Act, we think that the Board's jurisdiction to pass on petitions to revoke subpoenas duces tecum is original, not appellate, that the denial of the petitions by the hearing officer was a mere nullity, and that the respondents were not required to request special permission of the Board to appeal" (R. 164).

The Petitioner cites Davis, *Administrative Law*, page 74. At that page occurs this statement:

> "If a superior gives a subordinate elaborate and detailed instructions about the exercise of a power and closely supervises its exercise, acting personally in all important or novel cases, the real power is largely exercised by the superior, even though some of the routine problems that fall clearly within the terms of the instructions may never come to the personal attention of the superior."

This statement does not accord with the facts in this case. It is true that the hearing officer is a minor employee

having no real power as to *any important feature of the representation hearing*. As we have shown he cannot rule upon any important issue. But the Board has attempted to give him one of the most important powers exercised by any administrative agency—the power to rule upon subpoenas. And there are no "detailed instructions" about how to make his decisions—in fact no instructions at all except to exercise his "opinion."

Davis also states, page 75:

"The extent of permissible subdelegation depends primarily upon the intent of Congress."

We submit that there is a total absence of any intent on the part of Congress to allow subdelegation of subpoena powers to a hearing officer—in fact, just the opposite. The Act in question specifies *the Board* shall rule upon revocations. It seems apparent that Congress did not intend for hearing officers to rule upon petitions to revoke subpoenas since Congress would have inserted the words "agent" or "employee" as it did in other cases of subdelegation. For instance in the Act there are many instances where Congress specified subdelegation of powers:

Section 3 (b) where the Board is authorized to delegate "its powers" to a group of three members.

Section 3 (d) specifying that the Board may "prescribe" the "duties" of General Counsel.

Section 4 (a) which goes into detail as to the duties and powers of trial examiners.

Section 9 (b) which restricts to the Board, and the Board only, the power to decide bargaining units. It is interesting to note that here is exactly the same language as Congress used in the subpoena section but the Board has never contended that hearing officers, or any one else, except the Board, can determine bargaining units.

Section 9 (c) (1) where Congress expressly permitted the Board to have an "officer or employee of the regional office" to conduct representation case hearings but strictly limited his powers. In this same section the direction of an election is limited to "the Board" and the Board follows this—neither regional directors nor hearing officers can direct elections.

Section 10 (b) where the Board is empowered to designate "any agent or agency" to issue complaints and also permits the Board to have unfair labor practice hearings before the Board or a member of the Board "or before a designated agent or agency".

Section 10 (c) which specifically and carefully outlines how trial examiners are to make rulings and the Act here permits trial examiners to prepare and serve on the parties a "proposed report together with a recommended order, which shall be filed with the Board", and further provides that if there are no exceptions to the proposed order it will become the order of the Board.

Section 10 (e) provides that the "Board" may petition any circuit court of appeals for enforcement of its orders. This has never been construed to mean that the General Counsel or anyone else could so petition. The same power and the same wording is used in Section 10 (j) with the same interpretation.

Section 11 (1) where the Board is given authority of investigations the wording is "The Board, or its duly authorized agents and agencies * * * ." Here also we have the language regarding subpoenas which has been treated fully elsewhere in this brief.

Section 11 (2) where the "Board" only is given authority to apply to District Court for enforcement of subpoenas.

These citations bring almost overwhelmingly a conclusion that Congress specified where delegation could be made and where it could not and what was reserved to the Board for its original decision.

C. The Exhaustion of Administrative Remedies Theory

The petitioner contends that the Respondents fail to exhaust their administrative remedy of what it calls a "special appeal to the Board".

This is a novel and we believe an erroneous application of the theories of exhaustion of administrative remedies. Here the Board is contending in this Court that because the Respondents did not ask the Board if it could appeal that Respondents cannot now defend the Board's attempt to enforce the subpoenas. If there is any fault attaching to the fact that Respondents did not ask the Board's permission to "appeal" it is the Board's fault since the Board itself *refused* to rule on the petitions when they were presented. As we have previously pointed out in this brief the Board had a number of opportunities to consider and rule

upon the petitions. Since the Board itself brought the suits to enforce the subpoenas the Board in effect denied the petitions. Or the Board could have on its own motion ruled upon the petitions if such was deemed advisable. The Board cites such a case in its Brief, page 20, Note 9.

It seems to us that the Board waived any right it may have had to require a party to ask for permission to appeal, if it has any such rights, when the Board, after full knowledge of all the facts, proceeded in District Court for enforcement, without taking advantage of its several opportunities to rule upon them.

But there is no theory of exhaustion of administrative remedies that applies to this situation. As stated in 42 American Jurisprudence 583, ¶ 199:

> "On the other hand, the doctrine does not apply where, by the terms or implications of the statute authorizing an administrative remedy, such remedy is permissive only * * *,

citing in Note 9 the following cases:

> *Colteryan Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15, 1 A. (2d) 775, 122 ALR 1049; *Moore v. Illinois C.R. Co.*, 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754; *State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 NW 60, 89 Am. St. Rep. 514; *Smithmeyer v. United States*, 147 US 342, 37 L. Ed. 196, 13 S. Ct. 321.

In any event the doctrine does not apply where the administrative determination is attacked by way of defense

only. *Clinkenbeard v. U. S.*, 21 Wall (U. S.) 65, 22 L. Ed. 477.

A closer look at what is really concerned here convinces us that the doctrine would not apply for other reasons. The Respondents do not have any "remedy" at all. Here we have merely a negative statement in the Board's Rules, not in the law itself, promulgated by the Board, which does not give parties before the Board a "remedy" at all—merely says to the parties before it that they cannot appeal directly to the Board unless the Board approves such an appeal in advance. It is not a *requirement* that this be done—it is merely a hypothetical and uncertain possibility of an appeal.

It seems also from the fact the Board itself promulgated this rule and from its very wording that the Board has no standing in Court to urge that the Respondents are *required* to ask permission to appeal. The Board itself worded the rule and did not make it a *requirement* that parties ask for permission to appeal; the Board itself failed to *require* that parties appeal; the Board itself failed to word the rule so that a party would have a right to *appeal* rather than merely a right to ask *permission* to appeal.

We submit to the Court that we are not concerned with a Court review of an administrative action, we are concerned with a separate statutory proceeding designed and provided to aid the Board. The Board is the party in need of the Court's assistance. It seems to us that the Board, being the party in need of the Court's assistance is derelict in its duty and responsibilities to the Federal Government and the parties if it needlessly goes to Court when such action might not have been necessary and the Board itself

refused to make a decision (or claims it has not) that such application to the Courts is necessary. We submit the Board had at least five separate opportunities to consider and rule upon the petitions to revoke: 1, When petitions to revoke were sent to the Board by Respondents; 2, In communications with its hearing officer; 3, When the hearing was ended on the record as it then stood; 4, When the matter was turned over to the Board and the Board decided instead of ruling upon them to start proceedings for judicial enforcement; 5, at any time or its own motion.

CONCLUSION

For the foregoing reasons the Respondents respectfully urge that the judgment of the Court below be affirmed.

Respectfully submitted.

THEO HAMILTON
ATTORNEY FOR RESPONDENTS

January 1958.

Address of Attorney for Respondents:

HAMILTON & BOWDEN
401 Smith Building
Jacksonville 2, Florida

APPENDIX "A"

NATIONAL LABOR RELATIONS BOARD
Washington 25, D. C. January 11, 1956

Mr. Theo Hamilton
Hamilton & Bowden
Suite 401 Smith Building
Jacksonville 2, Florida

Re: Duval Jewelry Company of Miami, Inc.
Case No. 10-RC-3333

Dear Mr. Hamilton:

Your Petition to Revoke Subpena in the above-mentioned case has been received.

Section 102.58 (c) of the Board's Rules and Regulations require that a petition to revoke subpoena " . . . shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer . . ." Accordingly, the Board will not entertain your petition. I, therefore, am returning your petition herewith, for appropriate filing consistent with the Board's rules.

Very truly yours,

/s/ Ogden W. Fields

OGDEN W. FIELDS
ASSOCIATE EXECUTIVE SECRETARY

CC: Peter L. Hall
Regional Director
Hearing Officer